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FOREWORD

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June, 1964 WILLIAM S. HEIN

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THE WESTERN RESERVE LAW JOURNAL.

VOLUME IV

February, 1898 — January, 1899, Incl.

CLEVELAND, O.

1900.

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THE

WESTERN RESERVE LAW JOURNAL

Vol. IV FEBRUARY, 1898 No. 1

FELO DE SE.

HON. H. C. WHITE.

Love of life is one of two fundamental laws, or instincts, upon which the continuance of life is founded, the other being the procreative instinct. "Self-preservation is the first law of nature" is an old saying, based on a recognized foundation of truth and sound philosophy.

Dr. Strahan, in his work on "Suicide and Insanity," (and you will observe that in much of what follows I have not scrupled to follow him), associates these two fundamental instincts of all organic life. Without the procreative instinct, life would disappear with the death of the existing representatives of the families; without that of self-preservation, it is probable another generation would never appear, and if it did, it would immediately perish. This innate love of life is, in reality, a necessary part of life, and is proven by its universal co-existence with life. The all-pervading character of this instinctive straining after life is not fully recognized. It is not an attribute to animal life alone, but is also equally strongly developed all through organic nature, even to the lower forms of vegetable life. The individual, therefore, in whom the love of life is wanting is incomplete and abnormal. The continuance of life, either in respect to the individual or the races, and the absence of a desire to live, are incompatible. If the desire for life fades, death approaches. Everywhere in which life is met with in a healthy or normal condition, it is invariably found co-existing with this instinct, which is often so strongly developed as to overshadow every other natural desire. And the absence of this fundamental instinct is *per se* proof of unfitness to live.

From the foregoing physiological truth it is evident that the state-

Read before the Medico-Legal section of the Cuyahoga County Medical Society.

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ment that "the suicide dies because he is unfit for life" is absolutely true. This rule is applicable to the great majority of suicides of today, but it cannot be said to include all who seek voluntary death. What then does suicide really mean? There is a class of self-destroyers, so-called suicides—happily small in the present day—who do not come within the definition of true suicide. Such people destroy their lives for one of two reasons: either they have upon consideration come to the conclusion that death is the most acceptable of impending evils, one of which must be embraced, or they wish to gain, by their self-destruction, something they consider much more valuable than the life forfeited.

These quasi-suicides, as they should be called, make up but a small proportion of the suicides of modern western civilization. They formed the great bulk of voluntary deaths among the ancient Greeks and Romans under the teachings of the stoic and epicurean philosophers, as they did among the ancient Jews, the Asiatics and the Norsemen.

Suicides, therefore, naturally fall into two great classes: First—rational; and second, irrational. In one, the reason of the individual is called upon to decide between death and a continuance of life, and chooses the former; in the other the individual is impelled to destroy his life by an innate craving, or instinct, by what seems to be an uncontrollable impulse, or by the unhealthy reasoning of a disordered intellect.

The suicidal instinct might be defined as one of the signs of a markedly degenerate condition of the human organism, brought about by any or all of the thousand and one deteriorating influences at work among civilized communities, foremost among which must be placed the deliberate disregard of, and studied interference with, the laws of nature.

The immorality of the practice of suicide in ancient times was not a sign of intellectual degeneration. It was advocated by the leading philosophers and statesmen of antiquity as a just, rational and commendable way to escape the pain or disgrace, or even the inconvenience, of living. It is a remarkable historical fact, however, that in the simpler and purer life of Greece and Rome suicide was condemned. In ancient Athens the suicide was buried after sunset, his hand severed from the body and separately buried as the offending member, and confiscation of goods and disgrace and ignominy covered the memory of the self-destroyer. In the early days of the Roman republic the practice of suicide was equally reprehensible. Public law denounced it, and public opinion was strongly set against it.

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With the rise of the philosophic schools, and the corruption and decay of morals, consequent upon the prevalence of luxury and the ostentation of manners among these early people, the sentiment of opposition to self-immolation began to decline, and finally faded out entirely. Both the adherents of the stoic and epicurean philosophy advocated suicide as a commendable cult. The stoic was taught to believe his life his own; that he was sole arbiter of his existence, and that he could live or die as he pleased. The same principles were inculcated by the epicurean philosophy. Seneca, the tutor of emperors, and the philosopher who taught mankind morality of a high order, for any age, defended suicide. He said: "Does life please you? Live on. Does it not? Go from whence you came. No vast wound is necessary; a mere puncture will secure your liberty. It is a bad thing (you say) to be under the necessity of living; but there is no necessity in the case. Thanks be to the gods, nobody can be compelled to live." Epictetus, the learned freedman, said: "If you like not life, you may leave it; the door is open; get you gone! But a little smoke ought not to frighten you away; it should be endured, and will thereby be often surmounted." The strong and constant advocates of the right and duty of self-destruction, where the inclination existed, included the leading minds of antiquity; among the number were Zeno, Plato, Cleanthes, Cicero, Seneca, Epictetus, Marcus, Aurelius, Pliny, and a host of others.

Most of the great men of ancient Europe died by their own hands. The roster of distinguished suicides in the antique world is written in imperishable characters on the enduring monuments of fame. In this way died Lycurgus, Themistocles, Demosthenes, Aristarchus, Cato, Brutus, Cassius, Mark Antony, Lucien, Seneca, Nero and Otho, and a long line of others, who sought and gained immortality as statesmen, philosophers and soldiers.

Recognizing the impossibility of preventing those who wished to die carrying out their desire, and hoping in some degree to limit self-destruction by legalizing it under certain conditions, both Greeks and Romans instituted tribunals for the hearing of the application of those who wished to die. If the applicant showed what the court considered good cause for quitting life, his prayer was granted, and he destroyed himself with the sanction of the court. In some cases the court not only passed a favorable sentence, but supplied the means of death in a decoction of hemlock. Sir Thomas Moore, in his "Utopia," suggested a system almost identical with this. Roman law, as codified and commented on by Justinian as late as the sixth century, held that suicide was justifiable if it arose from *toedum vitas*—"disgust of life." The justifiable specific causes were grief at loss of friends; to escape

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disgrace of insolvency; bodily suffering or disease; and when the act arose from madness.

It is a remarkable fact that none of the prophets or religious leaders of antiquity, with the single exception of Mohammed, forbade suicide. There has been much thought expended on the moral and social side of the subject of self-destruction. Such modern writers as Hume, Gibbon, Donne, Madam DeStael, Voltaire, Winslow, Schoeppenhauer, and many others, have treated the subject in all its moral phases, and it must be admitted that the discussion is often quite unfruitful. In a very cursory and hasty study of some of these modern authors I have been struck with the diverse and often inconsistent points of view assumed by them, and the lack of uniformity in the conclusions reached. For instance, Dr. Henry Morselli, a very learned Italian psychologist, lays great stress upon the incomparable value of statistical science in elucidating the philosophy of self-destruction. He is enthusiastically wedded to the inductive method of treatment. Hence he considers all the literature on the subject, prior to the rise of the philosophic spirit, during the latter part of the 18th century, as comparatively worthless. The social significance of voluntary death began to be evident when a comparison was made between *homicide* and *suicide*. The psychological meaning of this moral fact—suicide—has always been enveloped in great metaphysical obscurity, because it appears less susceptible of positive appreciation than all other expressions of the human will. Dr. Morselli finds some difficulty in exhausting the discussion by positive analytic treatment. In the second part of his book he resorts to the synthetic method. The safety and value of the positive statistical method of treatment is founded on the proposition that the motives which prompt a man to take away his life are nearly the same as those which lead him to commit crime. It is admitted by these scientists that there are numerous predisposing causes, such as are dependent upon a morbid organization, either congenital or acquired—heredity, mental alienation, pellagra, delirium, drunkenness, hypochondria, physical disease, etc. That in another class of cases moral causes obtain, such as love, jealousy, ambition, shame, religion or political fanaticism, the fear of punishment, etc. It is insisted, however, that when these emotional conditions are in full play these causes are so manifest and capable of classification that the philosophy and value of the social facts elicited by the statistical process is still obvious. But it must be said that the motive of every suicide is not alone that which is apparent; there are other and more secret causes whose existence and influence elude even the suicide himself, such as education, moral contact, imitation and the multiform and imperceptible influences arising out of the moral and social atmosphere

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of the victim. The old philosophy of individualism gives to suicide the character of liberty and spontaneity. There is, in my opinion, much of sound reason and of truth in this theory. There is no phenomena of human action wherein the individual stands so supremely isolated from all social relations as in the act of self-destruction. The mysterious and intangible rays of influence effecting conduct in this act are so refracted through the "protean" prism of the individual conscience that the suicide, in the calculation of social forces, must ever remain *sui generis.*

Another author, Dr. O'Dea, in his work on "Suicide, its Philosophy, Causes and Prevention," adopts a contrary method of treatment. The fundamental theory of his discussion is, "that suicide has reference to the individual, viewed in the two-fold aspect of his social and personal life." It presupposes two necessary conditions:

1. Moral and physical impressions derived from without.

2. A nervous impressibility which magnifies and distorts these impressions, giving them a dangerous power to affect his happiness. He classifies the causes of suicide under two grand heads: First—external and social; second—internal and personal.

It must be said that this author has produced a work rich in the historical and etiological phases of the subject. His chapters on the Prevention of Suicide are reasonable, forcible and timely.

Morselli states what is doubtless true, that the vast multiplication of the wants, duties and struggles of the complex and artificial life of modern days is responsible for the enormous increase of suicides. He says: "The certainty of the figures and the regularity of the progressive increase of suicide is such and so great, even in respect to countries different in race, religion and number of inhabitants, that it is not possible to explain it otherwise than as an effect of that universal uplifting process which we call *civilization.*" It is true nevertheless that the present moral standards of society and the moral consensus of mankind are not in favor of self-destruction. The tendency of this same enlightened civilization is to establish the individual's tenure of life upon the theory that he holds it in responsible trust, rather than by an absolute title; that to seek to escape the responsibilities of this present existence, by his own hand, is cowardly, unmanly and in every way sacrilegious and reprehensible.

During the Napoleonic wars an epidemic of suicide sprung up in a certain corps of the army. The great captain, who was so profoundly wise in all human motives, stayed the ravages of this epidemic by an appeal to that virtue of courage which was the supreme passion of the French soldier. Napoleon made the following order: "The First Council directs that it shall be notified in the order of the

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day of the Guard, that a soldier ought to know how to overcome the grief and melancholy of his passions; that there is as much true courage in bearing mental affliction manfully, as in remaining unmoved under the fire of a battery. To abandon one's self to grief without resisting, and to kill one's self in order to escape from it, is like abandoning the field of battle before being conquered."

Peace hath her battles and her victories, as well as war. Why not inculcate this same heroic sentiment of fortitude and courage to overcome the evils and besetments of every day civil life.

It would be aside from my purpose to enter further into the history or moral aspects of the subject. At the close I shall venture to submit some suggestions on the uses of education and the creation of public opinion, as deterrents of suicide.

In what follows, I wish to call attention, mainly,

First: To the Relation of Suicide and Insanity, and

Secondly: Suicide in its relations to Life Insurance.

It has been remarked that savage people, living in a natural state, rarely exhibit this self-destructive tendency. The unbearable pains of hunger, or the stress of religious fanaticism, may lead to self-immolation. In natural life, however, the weak, defective or abnormal individual does not have to resort to suicide; these classes of degenerates are eliminated by the natural process of selection by which the fittest only survives. With such races it is only a step above the course of nature among the lower order of animals. The deformed, the lame, the wounded, or infirm in the herd or flock, are mercilessly turned upon by the stronger, self-selected individual who, as a stern executioner, under the inexorable law of nature, puts an end to the feeble ones unfitted to cope with life. Civilization reverses this order among men. With us the blind, deaf, dumb, idiotic, insane, epileptic, and suicidal, among countless others of the unfit, instead of disappearing, are reared with care. The hypochondriacal and melancholic who are totally indifferent as to life, are forced to live by the attention of their fellows. And all these weaklings are permitted, and at times even induced to contaminate the race by the propagation of their unfitness. In this way, from the hypochondriac who tells you that life is a curse, and from the melancholic who can survive only with occasional care in a lunatic asylum, —we deliberately cultivate the still more degenerate type, in which the parents' vital indifference is replaced by an active desire for death. By care and attention worthy of a nobler cause, even these are protected against themselves when impelled by nature to quit the life to which they are constitutionally unfitted, and are freely permitted, in the intervals between their suicidal outburts, to beget a still more degraded stock. In this last crop of degraded humanity, we find in profusion

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suicides, epileptics, maniacs, drunkards, and other depraved creatures, who never could, by any possibility, have been bred under natural conditions.

How far is insanity responsible for the majority of suicides? It is undoubtedly true that the proportion of suicides due to mental aberration is increasing.

Self-destruction, as a practice, is increasing with fearful rapidity. It has increased at the rate of thirty-three per cent. in the last twenty-five years in England; and at a rate of more than forty-five per cent. in America in the same period. You can scarcely take up your morning paper in any large city without noting the account of a suicide. Not all this enormous increase is based on an insane diathesis; much of it must be attributed to the waste and wear of our grinding, harassing, competitive life, where so often in the race for subsistence men and women are hounded by a gaunt and wolfish pack of cares. Poverty, extreme and unendurable, assailed by that consuming passion for physical comforts and the pride of possession, so characteristic of our American life, is chargeable with hundreds upon hundreds of acts of self-destruction.

It was recognized from very early times that under ordinary circumstances the insane were more liable to self-destruction than the general population; but none of the ancient writers treated all suicides as insane. One of the greatest alienists of Europe, early in the century, laid down the proposition that all suicides were insane. This was Esquirol, whom so many subsequent scientists have blindly copied in this conclusion. The argument is, that an act so repugnant to the natural instinct of self-preservation must be due to insanity.

In 1840 the first edition of a work which attracted wide attention was given to the English-speaking public by Dr. Forbes Winslow, who became a highly celebrated neurologist and master of pathologic psychology. His volume is entitled "The Anatomy of Suicide." He is almost the only noted Englishman who advocates the invariable insanity of the suicide. He has no patience with the practice of self-destruction, and denounces it as always a "crime against God and man." He says: "It is a safe doctrine *always* to presume the presence of insanity in those who have exhibited a desire to commit suicide."

The inconsistency of denouncing suicide as a crime "high up in the black catalogue of human offenses" and yet holding to the position that every suicide is an irresponsible lunatic, is patent to all. The trouble of accounting for the act, always on the theory of the presence of insanity, arises out of the difficulty of uniting on a universal working definition of "insanity."

Without a generally recognized definition, no hypothesis of in-

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sanity can be made rationally to account for every case; indeed, those who make this postulate, are influenced much by the popular notion, created by that practice of long standing in England, of judicially finding a verdict of "temporary insanity" in every coroner's inquest for suicide. This verdict is rendered so that the poor victim may receive Christian burial, and his heirs not be subject to the forfeiture of estate, according to the established rule of the common law of England. It is probably true that the belief in the invariable existence of insanity in the suicide was the outgrowth of the reaction against this inhuman and cruel treatment of the victim and his family. The amelioration of these harsh customs was due to that great upheaval and revolt against monarchial institutions, and violent clamor for human rights—the French revolution. This sentimental charity is reflected by Madame DeStael in the first sentences of her Essay on Suicide: "It is for the unhappy we should write, since to the children of prosperity experience is the only instructor, and by them all general ideas are considered as futile and unprofitable. It is otherwise with the afflicted; reflection is their best, if not their only asylum; insulated by adversity from the distractions of the world, they look into their own hearts with the solicitude of the sick man, who lies tossing on his bed of pain, to discover some position in which his sufferings may be mitigated. * * * It would be cruel to hold up to detestation those who are wretched enough to loath existence; it would be unjust to praise those who shrink from the duties it imposes; to bear the burden however great, is the test of strength and the triumph of magnanimity."

O'Dea sets down a third as the proportion of suicides insane, but attributes another third to what he calls "latent insanity."

The correct proportion is probably not greater than 25 per cent. of the typically insane suicides. The variation of proportions is due to the varying value put upon the evidence of insanity offered at inquests. If we must have delusions, incoherent language, purposeless, or wildly extravagant acts, imbecility, or utter vacuity to constitute insanity, then the lowest estimate of from eighteen to twenty per cent. is too high. But if we are to include among the insane, those who have been depressed and melancholic; those who leave clear coherent letters saying that they are tired of life, that they are dying to join lovers or other departed friends; that they are about to give way to an impulse which they have long fought against, but now find irresistible; and also those who may reasonably be assumed to have given way to an instantaneous impulse from the fact that no rational or reasonable cause for an act can be discovered, then, to include all these as insane—aberrant suicides would reach 90 or 95 per cent.

Of the truly insane who commit suicide, the majority are melan-

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cholics. In these cases the melancholia may be the cause of the suicide, or the suicidal impulse may have existed first and been the cause of the melancholia. In many cases of melancholia, the terrible depression which falls upon the mind and embitters existence, almost beyond endurance, is for a considerable time free from any suicidal desire. The time comes however, when the misery of existing, the dull pain of living, becomes more than can be borne, and the sufferer is driven to choose between two evils—perpetual torment or relief in death. In these cases the miserable victim has neither delusion nor hallucination, and his intellect is clear and perfect as it ever was. To him life is a long drawn out agony, and his gloom is no more insanity than is the irritability of the old gentleman with the gout in his great toe.

There is another class, that of the insane melancholiac, who, in addition to the mental depression, suffer from distinct mental alienation. The suicide of these is the result of delusions. They believe themselves guilty of some grievous offense, or unpardonable sin; they destroy life as an atonement, or are driven to it by some supernatural voice or direction.

Suicide is not often associated with acute mania. Sometimes during the onset of the maniacal fury, the patient may inflict injury on himself by dashing himself against a wall, or throwing himself down a stair way, or otherwise wounding himself. But such wild tumult of destruction is not the settled impulse of suicide. There is one transitory form of mania in which self-destruction is often effected—that is, mania connected with epileptic seizures. Not infrequently the victim of epileptic insanity, while unconscious of his surroundings, will destroy himself. Dementia contributes few cases of suicide. Senile dementia coming on at that period when the sands of life are nearly run, may be accompanied with that half-conscious indifference of life, which will lead to suicide. But dementia is often too inert and passive to furnish numerous cases of suicide. The idiotic very rarely destroy themselves.

There is a recognized form of abnormal mental or moral tendency called

THE SUICIDAL IMPULSE.

To this we must attribute the great majority of insane suicides.

This condition exists in two distinct forms. First, the "instantaneous impulse." In this case the onset of impulse is so sudden and overwhelming, that it paralyzes the will on the instant, and is immediately acted on. As a local illustration of this species of destructive impulse, I remember well facts stated by the late Dr. Proctor

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Thayer, when testifying in a case of insanity. A healthy strong man, in middle life, a butcher, carrying on a meat market, while at his shop, having cut a steak for a customer, suddenly drew his knife across his throat, and died instantly.

In the second, the growing impulse gradually develops and is experienced for a time, until it becomes strong enough to over-master the will and destroy freedom of action.

The first of these forms of impulsive suicidal mania is often aggravated, or incited by the sight of the means or opportunity for self-destruction. The sight of a razor, or pistol. Looking over an appalling or dizzy height. The first view on near approach, of the sublime and awful plunge of waters at Niagara—these situations may suddenly awaken this dormant impulse. Sir Samuel Romilly, the renowned English jurist, was a noted victim of this impulse. Under the stress of the instantaneous seizure, he gave himself a mortal wound, and almost, as suddenly the spell passed, his consciousness returned, and he endeavored in vain to stanch the fatal hemorrhage.

"The sight of means to do ill deeds, makes ill deeds done."

In not a few instances of this form of unpremeditated suicide, the person is thwarted in his purpose, or a fortunate accident prevents the fatal result. In many such cases the event becomes to the afflicted a horrible memory, and casts a shadow over the life which deepened into the true deliberate suicidal intent. Lord Clive, who conquered India for England, was a noted example. Twice in early youth he made unsuccessful attempts upon his life. He passed his great career in India, amassed immense wealth and achieved enduring fame in a quarter of a century of his life, and died finally by his own hand at the age of fifty.

The gradually developing desire for self-destruction is even more common than that just mentioned. First in such cases is noticed the disagreeable frequency with which the thoughts of suicide present themselves to the mind. The idea lingers and cannot be dismissed. Often the self-conscious victim of this persuing phantom of death, appeals to intimate friends for protection against himself. When the growing impulse is appreciated, it sometimes produces a melancholy which cannot be shaken off. Sometimes the idea of suicide, at first repelled, then tolerated, finally becomes pleasurable to the poor victim, and is entertained in the mental consciousness as a welcome guest.

Dr. Hammond says: "In some cases of emotional morbid impulse to suicide, the contemplation of the act is attended with feelings of

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pleasure. A man kills himself because he wishes to do so; and because of the satisfaction to be derived from gratifying his impulse. His intellect is not necessarily deranged; he acts with a full knowledge of what he is doing; and if the circumstances require it, he employs the most systematic and recondite stratagems in order to accomplish his purpose. He is neither governed by delusions nor by logical reasons. He is simply actuated by a passion which it is pleasant for him to gratify."

It would be interesting and not unprofitable to study the course of suicidal tendency as it is affected by slight provocation; by age, and sex; climate and seasons; by the imitative faculty, or epidemic suicide; by religion, education and morality; and most of all by the inherited degeneracies. But such discussion would extend these notes beyond endurance.

A peculiar line of interesting pathological discussion might be suggested as to the correct treatment of the insane suicide. I will venture to give you one case where heroic measures were resorted to with good effect. It was related in a newspaper sometime ago that a Chicago policeman discovered a would-be suicide wading into the lake on the lake-front. The officer instantly commanded the man to desist and return, to which the suicide gave no heed, but waded on into deeper water, whereupon the officer drew his revolver and threatened to fire if he did not stop. "Hold on, don't shoot" said the disconsolate victim, "I will come back," turning toward the shore. Thus we have another proof of that sublime therapeutic truth, that "like cures like!"

SUICIDE AND LIFE INSURANCE.

In nearly all policies of life insurance there is some proviso which tends to avoid the contract in case of the suicide of the policy holder. Sometimes this restriction extends over the entire life of the policy; but more generally limited to the first year or two. Upon the interpretation of these clauses, almost unlimted judicial learning and unwearied skill has been expended. It has been held that "suicide, death by one's own hand," and "taking his own life," are synonymous, having the same legal significance. 54 Me., 224; 102 Mass., 227. If a policy is taken out by one in good faith, and he subsequently commit suicide, there being no proviso against that act, the policy would not be voidable, especially not if the suicide were insane. In one case by the dicta of the judge, it was held that in that case the policy should be avoided because of the fraud committed against the company. Where a policy contained a clause providing against the operation of the contract where death was the result of any immoral act, it

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has been held that suicide is not such act and the policy holds good. In a case in New York, where a man who had become insolvent and lost his living for his family, deliberately procuring $282,000.00 of insurance in 36 different companies, being careful to see to it that there was no proviso against suicide, all with the deliberate purpose of afterward committing suicide, for the express purpose of securing sufficient to pay his debts and make his family easy, it was held that the policies were all void because "suicide was the ultimate agency by which fraud was accomplished." 123 N. Y., 85.

If there is a proviso in the policy against self-destruction, and the insured commits suicide, voluntarily and intentionally, while in the possession of his faculties, and conscious of the immoralities of the act, there is no difference of opinion; under such circumstances the policy is avoided. It is otherwise where the act is purely accidental or unintentional, as in poisoning by mistake, or accidental shooting, and wherever the act of self-destruction was unintentional. 85 N. Y., 320. The doctrine that the intentional, deliberate, and sane act of self-destruction by the insured, is such as to avoid the liability of a company, under the ordinary policy has finally been established within a few days, by the decision of the Supreme Court of the United States.

Where this proviso exists and the assured commits suicide, while insane, the determination of the question of avoiding the policy is different in different courts. On one point the law is settled. Suicide does not raise the presumption of insanity. In regard to the effect which the suicide of the policy-holder, while insane, has of avoiding the policy, there being a proviso against that made of death, the decisions can be divided broadly into two classes:

1st. If an individual commits suicide voluntarily and the act is carried out in an intelligent manner, in pursuance of a definite purpose, it is suicide on the part of the insured, even if he is urged thereto by an insane impulse, or if insanity exists to such an extent that the immorality of the act is not appreciated by him. 4 Allen, 96.

2d. "Unfortunately the sanctity of such motives as providing support for wife and children, and possibly other considerations, have in another class of cases influenced the judicial mind; consequently we find it held, that even if the act of suicide be voluntary, still, to bring it within the exception it must be accompanied by an understanding of its normal aspect, an ability to distinguish right from wrong, and also a freedom from the influence of an irresistable impulse." (Med. Jur. of Life Ins.) Hamilton's System of Legal Med., Vol. I, p. 577.

Thus we see that confusion still exists in the judicial treatment

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of rights under this class of contracts. There is no good reason why the old moral test of ability to judge the color of the act as to its being right or wrong, which pertains to criminal responsibility, should not aid in discovering whether the act to avoid the policy was an insane one or not.

The moral hue of suicide is changing with the enlightened opinions of mankind. It does not stand on the same moral basis as homicide. To hear that your friend has committed homicide, would shock and benumb your moral sense; to hear that he had taken his own life, would produce a shock mingled with pity and commiseration.

You will pardon me for the suggestion that a grave duty devolves upon a society like this, to make itself an organ of public sentiment and opinion. Every such body existing to cultivate intelligent thought, and encourage inquiry on sociological, legal, and medical science, owes a responsible duty to the public in the fostering of correct and sound standards of living. In medicine, if you will allow an opinion from a layman, preventive therapeutics and methods are coming to the front.

What should be done toward staying the ravages of self-destruction? Simply to provide discussion I venture to submit the following propositions:

1. The profession of medicine should teach in its schools, more fully than at present, sounder laws of mental hygiene, and aid people in the elimination of those twin demons of competitive life mentioned by Horace Fletcher,

> "Anger, the root of all the aggressive passions;
> And Worry, the root of all cowardly passions."

2. Education and custom being powerful factors in inducing to suicide, the widespread and incessant publication of the names, ages, sex, manner, and reasons and causes of suicides, thereby stimulating imitation, should be forbidden or curtailed by public law.

3. As the strongest safeguard against suicide is the sense of responsibility to a Supreme Being, for all conduct, including the faithful keeping and preservation of life; and this sense of accountability to the future being destroyed, no consideration of duty to family, society, or self being adequate to answer the arguments of the suicide, it is the duty of society to promote all those wholesome cheerful and rational sanctions of religion and education, which enrich, dignify and ennoble this present life.

Permit me to close with the following sentence from the German pessimist, Schoepenhauer: "Suicide may also be regarded as an experiment; a question which man puts to Nature, trying to force her to an answer. The question is this: What change will death produce in a man's existence, and in his insight into the nature of things? It is

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a clumsy experiment to make; for it involves the destruction of the very consciousness which puts the question, and awaits the answer."

INSOLVENT CORPORATIONS IN OHIO.

The status of insolvent corporations in Ohio seems to have been definitely fixed by the Supreme Court in its recent decisions and positive limitations placed upon their dominion over their property when in such financial condition that they can no longer prosecute the objects of their creation.

It has been doubted whether it is the province of the court to establish any such limitations, which perhaps might be more properly fixed by the legislature. It is said the ownership of property involves a sacred right, and that while the legislative body may regulate its use and promote the general good by insolvency and bankruptcy legislation, it is distinctly no part of the duty of courts to establish lines of public policy and make rules of property not specifically pointed out by statute.

The courts of Ohio have never undertaken to place any prohibition upon an insolvent debtor to prevent him from disposing of his property as he sees fit. The legislature has undertaken to prevent fraud, but the courts have been so extremely liberal to the failing debtor, in the construction of the statutes, and because of the undoubted right which every person has to use his own property in any way which is best for his own interests, and because of the jealous care with which the courts have guarded that right, there has grown up a line of judicial precedents in Ohio under which the dishonest trader now successfully commits every kind of fraud known to the commercial world.

If it be true that a corporation has the same rights as an individual to dispose of the property which it owns, and if the so-called "dominion over that which is his own" which courts become so eloquent over in construing private rights, applies to corporate property, then it is entirely clear that judicial precedent in Ohio permits a dishonest corporation to steal, just as it now makes it easy for a dishonest individual to steal.

Three distinct theories as to corporate property have been debated by the courts of this country.

One is that an insolvent corporation ought to be in all respects upon the same footing with an insolvent individual.

The second, that a corporation ought to lose all dominion over

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its property the moment it becomes insolvent, and thereafter hold it merely in trust for its creditors.

The third, that the insolvent corporation ought to be permitted to exercise full dominion over its assets so long as it is in good faith a going concern; but when it arrives at the point where it must cease business, then unlike an individual under similar circumstances, it ought not to have any power to do other than to distribute its assets ratably to all creditors.

The first view is very extreme in that it overlooks entirely the fact that the rights of creditors against an artificial person are necessarily limited as compared with their rights against a natural person. The former, by ceasing to do business and disposing of its assets, is literally dead, so far as it affords any further opportunity to creditors to compel payment. The latter, though insolvent and out of business, may acquire or inherit other means of paying the debt. This limitation on the rights of creditors calls for some corresponding limitation upon the right of disposing of assets in the case of insolvent corporate bodies. The constitutional remedy in some states of enforcing a stockholder's liability, will not ordinarily compensate for the difference in the character of natural and artificial persons.

Some American courts have, however, declined to concede that corporations should be on any different footing than individuals as to their power of disposing of their property when insolvent, and in some states the legislature has prohibited by statute any preference by failing corporations,[1] although not extending the prohibition to individuals. This doctrine is now opposed to the trend of American legislation, and is contrary to the great weight of judicial precedent.

The second proposition, that an insolvent corporation loses dominion over its property and holds it thereafter merely in trust for creditors, is the other extreme.

The invention of this doctrine is generally ascribed to Judge Story. This claim is not, however, strictly accurate so far as it relates to the particular case in which he is supposed to have announced the doctrine.

In 1824, Mr. Justice Story, then a member of the United States Supreme Court, while sitting with the Circuit Court in Maine, had before him the case of Wood vs. Dummer.[2] The officers of a banking corporation had distributed a 75% dividend to their stockholders. The bank at the time was insolvent, although it continued for another year in business, when it suspended without funds to pay its creditors. This action was brought by creditors to recover from the stockholders the amount which they had been paid in dividends. The pleadings made

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[1] N. Y. R. S. (8th Ed.), p. 1729, sec. 4. Georgia Code, sec. 4429

[2] 3 Mason, 308

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the issue of fraud, but none was established, and it also appeared that the stockholders had no knowledge of the insolvency at the time they accepted the dividend.

These creditors had no precedent at that time for recovery against the stockholders in a court of equity in the absence of fraud. It had indeed been held that a partner could not pay himself out of the assets of a firm to the exclusion of creditors, but this analogy would fail entirely when applied to a shareholder in a corporation, whose relation to the business was different. The alleged invention of Judge Story was a matter of necessity in order to reach a very desirable result—namely, that stockholders of a corporation ought not to get any advantage in the distribution of the assets of an insolvent corporation, and, in fact, ought not to get anything till the debts were paid.

The truth of this proposition of law had never been disputed, but the point was, in case the assets had been distributed, and in the absence of fraud, how and on what ground could they be reclaimed.

Judge Story said that because this corporation held its capital in trust for creditors, and that because this corporation was insolvent when it distributed this large dividend, it had violated its trust, and that the creditors who were the *cestui que trustent* ought to recover it back.

His meaning, as applied to the particular facts of this case, was, of course, that the equity of a creditor in the fund so reduced to a trust was superior to that of the stockholders, and he did not, in that case, go further and say that because of this trust no creditor could have any preference over another. This would have been a mere deduction from the rule he did lay down, and not necessary to the case in hand.

Mr. Justice Field, in a later case in the Supreme Court of the United States, makes this comment: "We do not question the general doctrine that the property of a railroad company is a trust fund for the payment of its debts. The doctrine only means that the property must be first appropriated to the payment of the debts of the company before any portion of it can be distributed to stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to a bona fide purchaser; such doctrine has no existence, and Wood vs. Dummer gives no countenance to anything of the kind."[3]

It was inevitable, however, that the "trust doctrine," as we find it today, should be deduced from Judge Story's rule in Wood vs. Dummer. The conclusion is not only logical but irresistible that if insolvency will create a trust as against the stockholders, in a case where such a remedy is a necessity, that a court of equity would be able to decree a trust as against a creditor who is seeking an unfair preference in a case where such a remedy was the only one left. In either case

[3]Fogg vs. Blair, 133 U. S., 541.

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the boasted "dominion" over property has disappeared under the demands of equity, and it does not dispose of the controversy to say that Judge Story never passed on the modern trust doctrine. He at least inspired it, and any other result would have been inconsistent with his position.

The third proposition that an insolvent corporation comes under the "trust" only when it ceases to be a going concern, or is in such an insolvent condition that it cannot do otherwise than cease, is the *Ohio rule*. It recognizes in general the rule that corporations do become trustees for creditors, but limits its application to extreme cases.

The policy of Ohio is indicated in the constitution itself, which provides a security for the creditor of corporations by a stockholder's liability, and makes this security inure for the equal benefit of all creditors, so that no one creditor can acquire any priority over another in the fund realized from this source, and the state has further indicated its policy by statutory restrictions imposed upon corporations interfering with their dominion over their property, by prohibiting any use of the property inconsistent with the purpose of the corporation.[4] Corporations in Ohio cannot be said to own their property in the same sense that natural persons own property. Our Supreme Court says: "It is now so well established as to be no longer a subject of controversy that the relation of *cestui que trust* subsists between directors and stockholders, * * * but it is the right of the *creditors* equally with the shareholders to have corporate property applied to the purposes for which the corporation was created, and this includes the corporate indebtedness contracted in the prosecution of its business. * * * It is now firmly established that the property and assets of the corporation are a trust fund for the payment of its debts, especially in case of its insolvency. * * * It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows that after the insolvency of the corporation is ascertained and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property, become trustees thereby for the creditors, and this relation necessarily prohibits any discrimination between the beneficiaries in the distribution or application of the fund. The due execution of the trust demands absolute impartiality toward the *cestui que trustent*."[5]

The court did not indicate in this case whether they would apply the same rule, providing the corporation were still a *going concern*, and in *good faith* engaged in the prosecution of its business. In the

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[4]R. S., sec. 3266.
[5]Rouse, Trustee, vs. Merchants' Bank, 46 O. S., 493.

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particular case before it the corporation had actually ceased business, thus not involving the other question.

But the court has since spoken in no uncertain terms, and announced that "a mortgage executed by a corporation is not necessarily invalid, for the reason that the company was known to be insolvent where the company is, at the time, in the possession of its property and in the active prosecution of its business, *and intends to continue therein.*"[6] In this case the company, though insolvent, were actively engaged in business and intended to continue.

It would not be wise to assume that the only thing necessary in Ohio to avoid the "trust" would be to *appear* to be a going concern. Equity always expects good faith, and looks to the substance rather than the form. Our Supreme Court has never intended to set up a particular model which it calls a trust, and then permit dishonest corporations to avoid it by keeping just outside the dead-line.

An insolvent corporation which cannot longer carry out the purposes of its creation, and which has no reasonable expectation of being able to continue its business, does not appear to advance its standing by pretending to *think* it can go on.[7]

STATUS OF A MARRIED WOMAN AT THE COMMON LAW.

(Portion of a lecture delivered by E. H. Hopkins to the junior class of the Women's College of Western Reserve University.)

In law women are divided into two general classes: 1, unmarried women; 2, married women.

At the common law an unmarried woman had exactly the same rights, liabilities and capacities as a man; but the status of the married woman was much different. From the very earliest times immediately upon marriage the wife's legal existence was merged into the legal existence of the man. Blackstone, who wrote in 1765, tells us that "By marriage the husband and wife are one person in law, *i. e.*, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated or consolidated into that of the husband, under whose wing, protection or cover she performs everything, and is therefore called in our law, French a "*femme covert.*" * * * Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by marriage."

The common law courts did not hesitate to carry this principle to the most extreme logical conclusion, regardless of the consideration of whether an injustice was worked thereby either to the husband or

[6]Damrin vs. Huron Iron Co., 47 O. S., 581.
[7]Remington vs. Central Press Assn., 3 O. N. P. R., 258.

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to the wife. As a consequence of the adoption of this principle husband and wife could not contract with each other, because it is of the essence of a contract that there should be two parties to it. A man cannot contract with himself and neither can he contract with his wife, because, according to the above principle, the man and his wife are one person. Neither could the husband convey by deed any real estate to his wife, because that would be an attempt to convey real estate to himself. And for the same reason, neither could the wife convey real estate to her husband. But if the husband or wife desired to convey real estate the one to the other, it became necesary to call in a third party to act as trustee. The husband would then convey the property to the third party as trustee, and this trustee would then convey to the wife. This, of course, was only a device to escape the operation of the above principle, but it was a device which the courts recognized for several hundred years, and it is used even today by many of our more cautious lawyers, although the Ohio legislature has enacted a law authorizing a direct conveyance from the husband to wife or from wife to husband.

Another consequence of the adoption of the above principle was that a husband could not make a gift to his wife because it was absurd to speak of a man giving anything to himself. Then, too, as we shall learn later, a married woman could not hold the legal title to personal property, and whatever personal property she possessed at the time of her marriage, or which she afterwards acquired during her married life, whether by gift or by will, or in any other way, immediately vested in her husband absolutely, with full power to dispose of in such manner as he desired, and subject to no restraint whatever on the part of his wife, and if he should die the very next minute after the property came to his wife, the property would descend to his own next of kin, and not to his wife. A married woman could not hold legal title to personal property, and there are many cases to be found in the reports where husbands have attempted to give personal property to their wives, and yet on their deaths the courts have taken this property away from the wives and given it to the husbands' next of kin. Here, also, the husband was obliged, if he desired to give personal property to his wife, to call in some third party and give the property to this third party as trustee for the wife. The third party was practically nothing more than a man of straw; but still in the eyes of the common law this man of straw had much greater legal capacity than did a married woman.

Another consequence of the adoption of the principle of the unity of man and wife was that they could not wrong each other civilly. If the husband should strike and beat his wife, she could not sue

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him for damages, for the reason that she and her husband were one person, and if she were allowed to bring an action at law against her husband it would be the same thing as allowing a person to sue himself, which, of course, would be an absurdity. Likewise, if the husband should slander or libel his wife, she would have no legal remedy against him. She, of course, could not have an action against him for injury to personal property, because she could own no personal property, and for injury to her lands by him she was also without remedy, because she could not sue herself. The same rule also applied to wrongs committed by the wife against the husband. The wife could strike and beat her husband; she could slander and libel him; she could destroy or otherwise dispose of or injure his property, and still he would be without legal redress. The wife could not sue her husband, neither could the husband sue his wife.

Another consequence of the adoption of this principle of the unity of the husband and wife was to give them immunity from criminal prosecution for certain crimes; e. g., the wife could not be guilty of stealing from her husband, neither could the husband be guilty of stealing from his wife, and we have reason to believe that in the twelfth, thirteenth and fourteenth centuries the husband had a power of chastisement of his wife which was limited only by the rule that he should not take life; and even in the Blackstone's time (that is, in 1765), and for many years later, the husband had the right to chastise his wife to a reasonable extent.

Having outlined in a very general way some of the effects of marriage upon the legal status of the wife, we will now proceed to examine more minutely some of the effects produced by marriage on the legal status of the married woman. First, at the common law; secondly, in equity; and thirdly, under our modern statutes.

First, as to the common law:

Before taking up the discussion of the status of a married woman at the common law, let us first ascertain what is meant when we speak of the common law.

The common law is derived from two sources: First, and chiefly, from the decisions of the courts from the Anglo-Saxon times down to the present; secondly, from many enactments of parliament which were passed hundreds of years ago, and which have become, by virtue of their age, to a very great extent fundamental rules of law. It is sometimes said that a third source of common law is usage or custom, but it is submitted that a usage or custom cannot become law until it has been recognized as such by some regularly constituted court of law. Courts have repeatedly refused for various reasons to give their judicial sanction to certain customs, and until some court is called upon to act upon an alleged custom we cannot know whether that custom will become law or not. Therefore there are properly only two sources of the common law, viz.: decisions of courts and ancient statutes.

A very large number of the ancient decisions of courts are still

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preserved, there being records of cases decided six hundred years ago, and we probably have complete record of all the important enactments of the legislature and charters of kings from the time of Alfred the Great.

The body of common law as so constituted our forefathers brought with them to this country as part of their common heritage, rejecting only such parts of the law as was clearly inapplicable to their changed condition. (Com. vs. Knowlton, 2 Mass., 530).

The legal status of the married woman was therefore the same in this country as it had been in England at the time when our forefathers came to this country, and the common law rules of the status of married women are exactly the same today as they were then, unless the legislature has expressly changed these rules.

Having explained what is meant by the common law, let us now consider what the status of married women was under this common law.

When we remember that the common law was formed and crystalized for the greater part during the centuries when the church was so powerful in all Europe, and when the high ideal of the leaders of that church was asceticism and celibacy, and imbued with this great ideal they tolerated the marriage relation as a necessary evil, and taught the doctrine that a married life was hostile to purity and holiness; and when we also remember that these leaders in the church were also leaders in the state, and leaders of public opinion, we shall not be surprised if we find that the married woman is not treated with as much justice as we of today think she should be treated. When Petrucio, in "The Taming of the Shrew," says of his newly-wedded bride that "She is my goods, my chattels; she is my house, my household stuff, my field, my barn, my horse my ox, my ass, my anything," he simply voices the view of the status of woman as held by the courts in the time of Shakespeare. The same view was expressed by one of the justices of the Common Pleas Court of England almost three hundred years before "The Taming of the Shrew" was first printed. In the year 1440 an action was brought for an assault and battery. The defendant admitted the assault and battery but justified his conduct on the ground that he used this force to prevent plaintiff from stealing his property. The law at that time was not well settled on this point as to whether a man could protect his property with force, but cases had already been decided in which it was held that a man could strike another in self-defense, or in defense of his wife. In the case above referred to one of the judges was very firmly of the opinion that a man should be allowed to use force in defense of his property, and in support of that view he uses the following language. "And suppose that a man was about to carry off your wife, would you not beat him? And notwithstanding that you beat him in defense of your wife, you shall be excused in law, for it is in defense of your chattel."

From this extract we can easily see that the position of the married woman in the fifteenth century was not, in the eye of the common law, a position of great dignity.

(To be continued).

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

It may be harping on an old string to call attention to the importance of our judiciary, but the subject is one of such grave importance that we venture a few words thereon. There can be no more important function than that of interpreting and applying rules of law. and the principles of justice to the ever-changing conditions of human society. None other is so far-reaching or permanent in its results, wisely and efficiently discharged; none other conduces so much to the true growth of civilization and the happiness of mankind, and in no other function are errors and inefficiency fraught with such ruinous consequences. It sometimes takes a century to eradicate a judicial error, and instances have been where such errors have hastened revolutions.

Since laws extend their influence over each individual, their effect is often for the time being not apparent, and since judicial decisions act directly only on the immediate litigants, we are apt to disregard their importance. Acting thus indirectly and unconsciously, errors are often allowed to continue and become engrafted upon our jurisprudence. This is one thing which has had a powerful influence on the popular prejudice against the legal profession.

Again, it takes a wise jurist indeed to recognize when a given rule of law has become inapplicable to the existing conditions of society, and it takes not only wisdom but judicial strength to declare such fact, so that from repeated, though perhaps unwilling application, rules are

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handed down to us, relics of a by-gone age and condition of society, which in every way hamper the administration of justice. This is to some extent a necessary result of our system of judicial precedent, but the evils could be largely avoided were our judiciary in the highest degree capable.

The lay mind is apt to consider the courts as being constituted solely for the benefit of litigants and as being of importance only to them, and hence the average citizen contributes unwillingly his share toward the maintenance of the courts. As has been shown this is a very grave error, and to it is due largely the inefficiency of our judiciary at the present day. We regret very much to say it, but it is true that our judiciary does not command and is not deserving of the respect which should be accorded this most important branch of our social system.

The safety and permanency of a community depends upon the confidence reposed in the laws of that community. Laws, merely as such, ought, in theory, to command the respect of a community. This respect will be in theory only unless the laws are of such a nature as to inspire confidence and respect, and therefore obedience. The same is true of those whose duty it is to interpret and apply the laws. It is idle folly and fanciful nonsense to prate about respect and reverence for our judiciary, unless it is composed of men whose character and ability is such as to inspire respect. In other words, we believe most emphatically that the wearer should impart added luster to the judicial robe, and not that the robe should impart the luster to the wearer. The man should dignify the office, rather than the office the man. Of late years the judicial standard has been so lowered that a judicial position is no longer sought by our most eminent lawyers. There are various reasons for this deplorable state of affairs. One is politics, the fact that a candidate for judicial honors indulges in political wire-pulling, should visit upon him overwhelming defeat. That it does not is a most potent argument against the elective system.

We wish, however, to speak here especially of another reason, and that is insufficient salaries. The judiciary of the state should represent the very best legal talent in the state. In order to do so the salary must be somewhat commensurate with that commanded by their practice. It may be poetic to talk about the honor of the position being sufficient compensation, but it is not common sense. To make it a position of honor, it must be occupied by men who bring honor to it. There must, at least in the present state of affairs, be something else besides honor to induce our best legal talent to resign their practice for positions on the bench. Therefore we would most earnestly urge the present legislature to so increase the salary of the judges of the

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Supreme Court that it may bear some resemblance to the importance of the office. It is a sad commentary on the intelligence of the state, that it regards the office of judge of the Supreme Court worth only $4,000 per annum. We should not be surprised if our sister states adopt our own estimate of the value of the Supreme Court.

As has been said, the fossilized rules of a by-gone age are the great hindrance to the administration of justice. No branch of law illustrates this better than the law of Evidence. One of the greatest authorities on the law of Evidence remarked to the writer a short time ago that "the whole law of Evidence ought to be taken by the neck and shaken to pieces." The reason is that it consists of technical rules, established when our present system of procedure was in its infancy. Many of these rules had perhaps a reason for their existence at one time, but if so it has ceased long ago. If any of our legislators wish to confer inestimable benefit on the legal profession, let him recast the law of evidence and make it consonant with modern conditions and requirements. This is a matter which could be very profitably taken up by our bar associations. The profession is justly censurable for permitting itself to labor under so many and burdensome restrictions. It owes it not only to itself but to the community at large to keep step with advancing civilization. The failure to do this results in injustice. Laws work injustice not so much because they were unjust when established, but because society has grown away from them; because they are no longer applicable to present conditions. The injustice is done partly because of this change, and largely because courts either do not see or refuse to recognize the change.

BOOK REVIEWS.

HANDBOOK OF THE LAW OF EVIDENCE, By John Jay McKelvey of the New York Bar. Hornbook Series. St. Paul: West Publishing Co.

It must be nearly twenty years ago that Professor J. B. Thayer of Cambridge allowed his publishers to announce a text-book on the law of Evidence as in preparation by him. The announcement has been repeated several times since, but nothing has actually appeared except his first few pages on the development of the jury. He says in his preface to that that he found early, in order to write such a work on Evidence, much preliminary work into the history of the jury must be done. In other words, he was in his judgment not prepared to write a text-book on the subject as he felt it should be. This same

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feeling, however, has not affected some of Prof. Thayer's friends; for instance, Chamberlayne's edition of Best on Evidence will be found to acknowledge his indebtedness to Prof. Thayer for many of the valuable notes in that edition. And in the book before us it is said in the preface that "Acknowledgement is due and freely given to that admirable collection of cases on the subject of Evidence compiled by Prof. Thayer of the Harvard Law School, upon which the author has drawn for very many of the illustrations cited and to which he has very generally referred for the early cases." It should be remarked that a casual examination will show that the author has drawn for much more than some of the earlier cases. The classification and order of arrangement of the subject have been very plainly taken from Thayer's cases, and the frequent citations to the notes in the cases, the notes in Chamberlayne's Best, and articles by Prof. Thayer in periodicals, will reveal the origin of much that is valuable in the book. This may all be very fortunate for the profession and the student, but it would seem that more credit could well have been spared to the real source of the best part of the work.

We are not at all sure that the Hornbook black letter style is a good one, but assuming that it is, it would seem that this particular example is well done. The most advanced distinctions worked out by Prof. Thayer in his historical method are put as well as could be done in the abbreviated form required by such a text-book, and the general statement of well-established principles seems clear. It is certainly a valuable book and is another reminder of what may be hoped for in the long-promised text-book of Prof. Thayer.

It is unfortunate that references to cases so carefully duplicated in the Reporter series, should not also have been extended to Thayer's cases, from which they are so freely taken and acknowledged.

H. H. Johnson.

A LEFT-HANDED APOLOGY.

A young advocate before the Scotch Lords of Session, on hearing a decision against his client, which he deemed contrary to law and justice, so far forgot himself as to exclaim that he was "surprised at such a decision." Their lordships were very angry, and were considering how to mark their sense of the advocate's impertinence, when a pawky old counsellor rose, and besought their lordships' forgiveness for the slip his young brother advocate had made. "It was purely lack of experience that led him into error. Had he known your lordships half as long as I have done, I'm hanged if he would have been surprised at anything your lordships said or did."

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Ohio Digest.

(Reported to January 24).

Agency. Owner of lot is liable for injuries received from obstructions placed in street by a contractor while erecting building on the lot. 7 O. D., 638.

Alimony. Wife having obtained a divorce cannot later obtain alimony by separate action. 38 Bull., 304; 57 O. S. Adv., 101.

Amendment. Petition may be amended after trial to make it conform to facts proven where it does not substantially change plaintiff's claim. 14 C. C., 628; 7 O. D., 682.

Appeal. Finding of county commissioners determining necessity of certain improvement is a final order within R. S., §4452, from which error may be prosecuted. 15 C. C., 36.

Appeal may be prosectued from a final judgment rendered by court of common pleas in a mandamus proceeding. 15 C. C., 40.

Appointment. When statute requires appointment of an officer on a certain day, appointment made will be good, although term of appointee would begin after the expiration of the term of the appointing officer. 14 C. C., 614.

Assignment. Assignee in insolvency of a lessee may elect whether to accept or reject lease. 4 O. N. P., 441.

Deed of assignment embracing land in a county other than that in which assignor resides takes effect against all persons from time of its delivery to probate court of county where residence was and need not be recorded in county where land was situate. 14 C. C., 599. 7 O. D., 692.

On assignment of assessments which are guaranteed good by assignor, assignor is not liable for attorney's fees incurred by assignee in bringing action on assessments which are found invalid. 57 O. S. Adv., 105; 39 Bull., 6.

On assignment by a plaintiff of all interest in a pending suit, action may proceed in name of such plaintiff, or court may allow substitution of assignee's name; but the assignment is no defense to the action. 39 Bull., 11.

Bona fide Purchaser. A judgment creditor becoming purchaser at judicial sale of land owned, as appears of record, by judgment debtor, may be a bona fide purchaser. A recorded mortgage to the judgment debtor is not constructive notice to purchaser of a prior unrecorded deed by debtor to the mortgagor. 38 Bull., 309.

Bond. Given by builder to board of education providing for payment of laborers and material men is not beyond power of board and obligation may be enforced against sureties by any such laborer. 15 C. C., 47.

Comity. A special remedy provided by laws of Kansas against stockholders of corporations of that state will not be enforced in Ohio. 4 O. N. P., 435.

Constitutional Law. Act authorizing licensing of transient dealers in cities and villages unconstitutional. (87 O. L., 100). 14 C. C., 592.

Contracts. Where under a contract to deliver coal for a year at a fixed price, coal has been delivered during season when market price exceeds contract price; but on the market price falling below contract price the vendee repudiates the contract, the vendor may waive the contract and sue for market price of all coal delivered prior to repudiation. 39 Bull., 16.

Corporations. Where partners dispose of partnership property at an inflated value to a corporation of their own making in payment for stock in such corporation, and corporation becomes insolvent, the transaction will be deemed fraudulent and the difference between actual and fictitious value of property thus transferred will be treated as unpaid subscriptions upon the stock, if necessary to protect creditors. 38 Bull., 275; 57 O. S. Adv., 60.

Member of a private corporation organized for mutual benefit of members, if unlawfully expelled, is not entitled to mandamus to restore him. 39 Bull., 42.

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Criminal Law. Verdict of guilty in trial for pocket-picking is valid, though the value of property is not found. 38 Bull., 279.

Conveyance of weapon to a prisoner in jail with intent that he should use it to effect escape while temporarily out of jail in custody of sheriff comes within meaning of R. S., §6902. 7 O. D., 622.

In an indictment for perjury it is not necessary to aver whether false testimony was oral or in writing or any facts showing materiality; question of materiality is one of law; any evidence which might influence court or jury in a case is material to the issue therein. 15 C. C., 14.

Election. Owner having two grounds for contesting validity of assessment, one pertaining to himself alone, the other common to himself and others, election to sue on latter bars any other action on former ground. 38 Bull., 305; 57 O. S. Adv., 132.

Election Law. One elected to fill a vacancy under Rev. Stat., §1243, temporarily occupied by an appointee, cannot qualify and assume the office until the time when the term of such office regularly begins; but beginning from that time, serves a full term. 4 O. N. P., 421.

Supervisor of elections not required to print on ballots a device for any ticket nominated by nomination papers. 39 Bull., 45.

Evidence. In bastardy suit evidence of opportunities for sexual intercourse between prosecutrix and others within six months or a year of time of conception without showing a disposition thereto is inadmissible. 14 C. C., 619.

Where jury are instructed to disregard evidence which has been improperly admitted, judgment will not be reversed on account of such error in admitting it if prejudice to defendant has not resulted therefrom. 7 O. D., 632.

Evidence of acts or declarations of third parties alleged to co-conspirators with a defendant cannot be received unless apart from them there is prima facie proof of a conspiracy. 7 O. D., 664.

Injunction. No injunction is necessary to hold property in an application for divorce and alimony where property is described and owner and other parties interested are made parties. 7 O. D., 605.

Jurisdiction. Circuit court may reverse order discharging an attachment made by judge of common pleas in chambers. 38 Bull., 296.

Order made by common pleas court vacating another order made at same term, which inadvertently was not entered on journal, may be entered nunc pro tunc at succeeding term. 39 Bull., 12.

Courts will not interfere to control discretion of board of education in performance of its administrative functions by compelling them to build a bridge to afford access to school. 15 C. C., 10.

Jury. When one called as juror says he has formed or expressed an opinion, he should be carefully examined as to grounds of that opinion and must convince the court that he will be able to render an impartial verdict. 7 O. D., 664.

Insurance. Adjustment agreement expressly providing that such agreement shall not waive formal proof or other conditions of policy, raises no implied promise sufficient to maintain action against company other than on policy. 14 C. C., 657.

Judgment. Of common pleas ceases to operate as lien if execution not sued out within five years from date of judgment; date of judgment is the first day of term at which judgment was rendered. 7 O. D., 25.

Lease. Entry under a lease for a term of years, which is void for any cause, creates a tenancy from year to year; tenant holding over after end of term becomes liable to landlord for rent for the year. 38 Bull., 295.

Mandamus. Not a civil action and not appealable. 14 C. C., 660.

Mortgages. A first mortgage of chattels, though unfiled, will take precedence over a second mortgage if second mortgagee has notice of prior lien. If, after an assignment by mortgagor for benefit of creditors, action is brought by creditors to adjust conflicting liens of property and it is found that either claim will exhaust the property, controversy between the two mortgagees

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will be considered as though there had been no assignment. 39 Bull., 12; 57 O. S. Adv., 148.

Oil and Gas Lease. Providing that one well be completed in six months, there is an implied covenant by lessee to drill and operate such number of wells as will reasonably develop the land; but breach of such implied covenant will not work a forfeiture. 38 Bull., 283; 57 O. S. Adv., 118.

Lease providing compensation to lessor in event gas wells are obtained with pressure exceeding 200 pounds to square inch, no such well having been developed, lessor cannot claim any rental, compensation or damages. 7 O. D., 700.

Negligence. Defendant Ry. Co., in an action for negligence, is entitled to a charge to the effect that if plaintiff before attempting to cross track could by looking have seen the train, but failed to look and was consequently injured, he cannot recover. 14 C. C., 582.

Injury caused by defective machinery of which defect plaintiff had notified foreman, and which the latter afterwards informed plaintiff he had remedied; if plaintiff relied on such statement and was injured without his fault he may recover notwithstanding he had equal means of knowing of defect with defendant. 14 C. C., 628; 7 O. D., 682.

Railway company is liable for leaving a quantity of crude oil on side track where a brakeman, in performance of duty, goes according to custom, and slipping, is injured. 7 O. D., 632.

Employer liable to employee for injuries received from defective machinery, the defect in which ordinary care would have discovered and guarded against, provided employee was ignorant of defect and it was not incumbent on him to examine as to this. 15 C. C., 26.

Pleading and Practice. Judgment by a mayor for conviction under city ordinance is reviewable upon weight of evidence. 14 C. C., 592.

Mayor, in trial of a criminal case before him, has no authority to grant defendant ten days in which to prepare and file a bill of exceptions. 15 C. C., 32.

Probate court may, none of parties to a case appearing, continue a case indefinitely on his own motion. 7 O. D., 1.

Decision of common pleas reversing a sentence imposed by J. P. may be subject of exception by prosecuting attorney. 39 Bull., 42.

Preferred Creditor. Cannot participate in a dividend among general creditors, until the security for his claim has been exhausted. 4 O. N. P., 439.

Probate Court. Has power to modify a report of a committee sent out to assess damages incurred in building a ditch. 7 O. D., 593.

Railroad. Railway operating on a street is liable to owner of premises situate near, though not abutting on street for damage resulting from sparks, cinders, etc., but not for an obstruction to traffic suffered alike by public. 15 C. C., 1; 7 O. D., 64.

Real Property. Question whether land was acquired by purchase or inheritance, where legal estate and an equitable interest have united in one person, determined by manner in which legal title was acquired. 39 Bull., 40.

Sheriff's Fees. Mileage allowed to sheriff by R. S., §719 for transporting insane person to asylum does not include mileage for assistant accompanying sheriff, although assistance was obtained by direction of the probate court. 39 Bull., 9; 57 O. S. Adv., 144.

Surety. Where indemnity is secretly given one to induce him to become co-surety on a note such indemnity inures to benefit of other surety. 14 C. C., 646; 7 O. D., 671.

Township Trustees. Are not within R. S., §5226, and must give appeal bond. 14 C. C., 660.

Variance. Allegation that defendant entered poultry house of plaintiff is supported by evidence of an entry into one of several compartments under a continuous roof of which plaintiff had exclusive use 38 Bull., 288.

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THE

WESTERN RESERVE LAW JOURNAL

Vol. IV MARCH, 1898 No. 2

THE CASE METHOD.

The question as to the best system of instruction in the law school is always an interesting one to the instructor and a vital one to the student. The instructor is ambitious to use the method which will afford the best results. The student is equally ambitious to equip himself most thoroughly for his professional career.

The last twenty years has witnessed what might be termed a revolution in systems. The old method of instruction by text-books and lectures has been gradually giving way to the case method. Prof. Langdell of the Harvard Law School is entitled to the credit for having conceived and put into active and successful operation the case method of instruction.

The text-book method of instruction is that method where the instructor selects some leading text-book on his particular subject and assigns a lesson for the students to prepare and recite to him, the recitation accompanied by explanations and lectures on the part of the instructor.

The case method is that system of instruction where the instructor has collected the leading cases on his particular subject, beginning with the earliest adjudications and authorities and following on down to the present time, tracing the principles of law from their earliest application, noticing their different phases of development and growth until they find a place in the latest judicial decree. The student is assigned as a lesson a certain number of cases, with references to statutes and text-books bearing on the subject for investigation. These references the student must look up and study and be prepared to discuss at the next hour. The instructor calls on him to state the facts in a particular case and the proposition of law involved in that case. Asks him if he agrees with the law as there laid down on principle and his reasons for agreeing or disagreeing; and after the student

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has given his opinion and his reasons therefor, the instructor places the legal proposition involved before the entire class for discussion.

The students conduct the recitation and the instructor simply shapes the discussion, suggesting some new ideas, supplying additional facts to the case under review, in order to present the legal proposition in a new light, and closing the discussion when it has ceased to be profitable.

It is not the purpose of this article to present an argument in favor of the case system, so-called. The argument stage has long since been passed; the experiment stage has long since been passed, and the case system stands today approved and substantiated, not by arguments or experiments, but by results. The student, however, when he first enters upon the study of the law, is always grasping for definite propositions, for hard and fast maxims, and wonders why he should be compelled to study old cases long since overruled, old authors long since obsolete to everyone but the scholar, and is continually asking, "What is the law today?" It is to answer in some slight degree this query that the present article is written.

The object of all professional study is to best fit the student for the actual practical affairs of his chosen profession. It is necessary therefore that he must first acquaint himself with the substantive law before he is in a position to take up its application. He starts on his preparation, and one of the first propositions he comes across is that "everyone is conclusively presumed to know the law," and he reasons that if everyone is conclusively presumed to know the law, no one can be heard to affirm that he does not, and wherefore should he vex his brain? With this proposition in mind he drops into the court-house. He sees learned jurists on opposite sides of the trial table, one insisting that this is law and reading books galore, the other insisting that "the proposition contended for by my learned brother is absolutely untenable in reason and contrary to law," the trial judge holding that neither are right, the reviewing court overruling the trial judge, and the Supreme Court reversing them all. The student who has followed the litigation, seriously asks himself the question, What is law? Law in its broadest sense consists of those eternal and everlasting principles of justice, equity and right, which the general consensus of opinion of enlightened humanity has insisted shall apply to a given condition. It is today embodied in what is known as the common law, statute law and judicial decisions. *Law is a growth.* The performances of state legislators amount to very little. They paste up the statute books with blurs and blotches in a mad race to win some passing favor, and get blown into congress on a temporary breeze of popularity. Such so-called laws are simply weeds in the garden of jurisprudence; they

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flourish for a season and are cut down and cast into the fire. When a statute embodies some principle, a principle which has always existed but just discovered and applied, then it stands and becomes a part of the written law. The random decisions of judges with minds warped by prejudice and an eye to the next popular election, when they expect to be candidates for re-election, are no cause for anxiety; their decisions will be reversed in time and right will prevail.

The principles of law have always existed. It is the business of the lawyer to discover and apply them. The law of gravitation was not created by Newton. Apples had been falling for centuries before he was born. He simply stated the law in scientific terms. Who created the law that if A hires B at $1.00 per day to work for him and B performs the work satisfactorily, A must pay B $1.00? Where is the statute that enacts any such law? These are illustrations of natural law and human law, the one as fixed and immutable as the other. The difference arises only in their application. Nature enforces her own decrees, while we are dependent upon finite wisdom for our decrees.

Law, then, as we have it today, is a growth, broadening and taking in new conditions as the human mind becomes enlightened and grasps old truths and principles, which, just discovered, seem always new. It is not strange that the student, when he first surveys the field through which he must plow, wonders how he can till a field apparently so full of stumps and rocks and pitfalls with any degree of success. It is the duty of the instructor to take the student, when he starts on his journey over this unknown territory, and explain to him the apparent inconsistencies historically; to direct him in his investigation of exploded fallacies, erroneous theories and false reasoning, and to assist him in tracing the golden chain of law thro' all the rubbish, so that when his journey is completed, and the student looks back over the field he has just traversed, instead of a barren waste he sees a landscape of beauty, with every feature blending harmoniously. It is a narrow and contracted conception of law which is always quarreling with its apparent inconsistencies and fails to grasp the distinction between law and its application.

The case system or method of instruction recognizes the fact that the present status of the law is a growth and takes the student back to the earliest authorities and decisions, searching for the original application of elementary principles and from that as a starting point follows the course and development of that principle in all its stages down to the present time. This is the scientific method. In chemistry, with a given substance to determine its component parts, it must be analyzed and separated into basic elements. So with a legal proposition. In geometry we begin with fundamental truths and advance gradually

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and confidently to the comprehension of more complex propositions. In arithmetic we begin with addition, subtraction, multiplication, etc. —knowledge absolutely essential to any intelligent progress. What an absurdity it would be to say to the beginner: "Here is the rule for extracting the cube root; learn it and you have mastered the subject." It is just as absurd to give the student a proposition of alleged law and say to him: "Commit that to memory and you have mastered it."

Law is not printers' ink, and a good memory does not make a good lawyer. Ability to reason logically along legal lines is absolutely essential, and while the student is learning elementary law every effort should be made to bring into play the logical faculty and teach him from legal premises to draw legal conclusions. This is one of the greatest benefits of the case system, for it almost compels the student to be a legal reasoner. The application of legal principles to actual or supposed cases disciplines the mind of the student, so that it is compartively easy to apply legal principles correctly to the cases as they arise later in active practice. It is the object method of instruction applied to law.

It is sometimes objected that the case system has a tendency to make a man a "case lawyer." The term "case lawyer," when used in this sense, means a lawyer who is nothing more or less than a digest of cases without any clear understanding of legal principles. This we believe to be an unfair criticism. Undoubtedly the case system familiarizes the student with the leading cases upon a subject which in and of itself is a good thing; yet the idea that it is a part of the student's work to carry in his mind the multitude of facts in which the legal principles may be embodied in a decision is decidedly erroneous. The facts are simply the shuck, while the kernel, after which the student is striving, is the legal principle involved.

The lawyer well grounded in legal principles is the most independent of thinkers. He discusses every question from the standpoint of principle, and instead of being bound down by cases, and lost if he cannot find a decision in point, he draws his conclusions from legal premises and confidently and successfully attacks any decision which is illogical and wrong on principle. The case method teaches the student to measure every decision from the standpoint of principle. If the decision does not bear investigation along those lines he holds it bad law, regardless of the dignity of the chancellor or chief justice who may have handed down the decision. If a text writer does not lay down the law as the student has discovered it to be, he holds it bad law. He has been to the same sources of information as the writer and can speak with as much authority. The case system qualifies the student to write text books, not to commit them. It would seem, then, that the natural and logical tendency of the case system would be not to

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make case lawyers chained to precedent or lost, but, on the contrary, free and independent thinkers attacking error wherever found, no matter how strongly entrenched behind wig and woolsack.

We answer the query of the student then by saying that, in order to understand the law of today, it is necessary to know the influences which have shaped its growth—the underlying forces and principles which have moulded its form, its historical development, the elementary and fundamental principles which are the basis of our system of jurisprudence. In this way only can one hope to arrive at a broad and just comprehension of modern law in all its grandeur and beauty.

PAUL HOWLAND.

THEORIES OF PUNISHMENT.

Criminal jurisprudence, by reason of its relation to government and civilization in general, has reached its present status only after having passed through a long evolutionary process dating back to barbarism and government by force. During this development and application of the general scheme of punishment, many theories have been tried and still more promulgated, and that the end is not yet seems clearly evidenced by the continuing divergence of thought between jurists and sociologists of the present day. The "eye for an eye" rule of the old dispensation obtained among many peoples and for long periods of time, only to be supplanted by the humaner "love them that hate you." Revenge, as the objective point in punishment, has been opposed by the more modern theory of regarding crime as the result of a moral illness which ought not in justice to be *punished* at all, but cured. The motive, urging the infliction of pain on the wrongdoer, ranges through various degrees, from the personal satisfaction of the wronged on one side to the protection of the state as a social entity on the other. And after having claimed the attention of thinking men in all times and of all classes, and undergone such radical changes, the question of what to do with the morally deficient, what right and purpose the state has in punishing, appeals to the legislator and citizen now with even greater pertinence than in times past. The great importance of the disposition of the criminally-inclined to our political welfare, and its vital connection with the social and economic problems of the times, render its investigation and consideration one of the most fruitful and urgent.

Justice is, in a strict sense, a relative term, and as such our conception of it changes with our environment and in view of new light on its subject-matter. In the matter of criminology this change is marked. The light of science is being brought to bear on the causes

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and treatment of crime. Its development is being traced in connection with the influences of social and economic conditions, of heredity, of insanity, and even religion. The state seeks to base its right to punish on positive, fundamental principles, and to measure the extent of the punishment in accord with the highest degree of justice to itself and the individual. The time was when the overt act alone marked the crime, the criminal intention being inferred from the nature of the act. More especially, as regards that branch of criminology which has to do with mental derangement, motives were not traced to their source nor analyzed in regard to the criminal's sanity. From that point of view we now note a reaction, which in some cases goes to the other extreme and would make insanity the cloak under which to conceal a criminal intent. Too often the element of revenge and retaliation has dominated in the theory of punishment; the other extreme in this direction is reached by those who would treat the criminal as an unfortunate, whose act is the natural result of heredity or his evil environment, thus not properly a thing to be punished but attributable to the general state of society, who must bear with and condone the act of its erring member. Passing over those theories which are no longer tenable in part or in whole, let us review some of the more fundamental ideas involved in the term punishment, ascertain their respective worth and the influence which ought to be given them, and determine, if possible, the basis and extent of a just system of criminal jurisprudence.

Governments, being the duly authorized agents through whom states act in their effort to establish justice and promote the general welfare, clearly exercise a proper function when they establish laws regulating the individual conduct of their members and secure their enforcement by various rewards and penalties. Violations of such rules of conduct are termed crimes and ordinarily draw after them an established degree of punishment for the criminal. Thus the purpose of the penalty is to secure conformity to law, which amounts to nothing less than that it is grounded in the welfare of the governed and is justifiable only when it promotes that end. This fundamental principle in the punishment of crime it seems hard to controvert. By the wholesome inculcation of a fear of the result, on the part of those inclined to crime, it operates as a powerful restraint, and thus furnishes an added motive to obedience; and by inseparably attaching to the crime an appropriate penalty, it exhibits and intensifies the wickedness of the transgression. It appears then that, as referred to the criminal, punishment may act as a discipline and correction, although it is to be remembered that this is incidental to its main object, which is the safety and protection of society. It is likewise to be remembered that the criminal is a constituent part of the social whole, and that when

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his reformation can be coupled with that of punishment, such improvement of the criminal unit will be in accord with the general plan of public welfare, although always subservient to it.

Referred to this principle of punishing only on the ground of public welfare, the idea of retribution finds no place. At times when public sentiment is deeply aroused by the commission of some monstrous crime against humanity, the desire for retaliation on the part of those wronged seems natural and justifiable, but it forms no part of an enlightened public policy. This is illustrated nowhere better than in the modern lynching, where the main motive is revenge, but which subverts the essential ideas of justice by adding crime to crime and results in an actual loss to society by lessening the power and dignity of the law in removing from its jurisdiction the criminal, which it is at once bound to punish and protect. The argument sometimes offered in excuse for such outlawry, that the established punishment is by no means proportioned to the monstrosity of the crime, is not valid, since the state has within itself the means of changing that punishment as experience shows its insufficiency. Punishment, though working hardship to the individual, nevertheless finds its basis in justice, and justice can never compensate the parties wronged by granting or allowing them the right to commit another wrong (if indeed such a paradox can be maintained even for argument) in order to express their feelings of revenge and retribution. Crime as crime must be punished, not by virtue of any inherent or absolute right on the part of the state, but on grounds of expediency. As a violation of moral law, society has no right to punish crime, but as violation of a statute enacted for its own preservation, the case is placed on proper basis, for of that it is both the creator and administrator. Revenge and the satisfaction of the animosity engendered by the commission of some atrocious deed, can in no way contribute to the establishment of that law and the consequent welfare of the state.

There is exhibited on the part of one branch of the new school of criminology a tendency to regard the criminal as one who errs through ignorance, as a victim of an unfortunate environment, and the crime as one of the natural results of a false social system. Not he, they argue, but the state of society around him, the social and economic difficulties which he has to meet, is responsible for his departure from the normal course of rectitude, and consequently his deeds are not to be punished but condoned as his misfortune. As a diseased part or organ of the body politic, he is, perhaps, amenable to treatment for his so-called infirmity, but such doctoring is to work him as little mental and physical harm as possible. This seems humanitarian with a vengeance. It is admitted that heredity and environment do affect a

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proneness to sin, yet no reasonable ground for foregoing the punishment is thereby shown. If for no other reason than as a motive for the prevention of future crime on the part of others who may be affected by his example, society has a right and of necessity must demand that he be punished, remembering if it will that such punishment may be inflicted as will operate also as a treatment for the "chronic" criminal ailment. As a violator of the law which has been established for the protection of society, he must suffer the penalty; yet, being still a man, he is entitled to all "the offices of humanity which are consistent with the treatment of him as a criminal." The penalty must always be warranted on the grounds of utility, to which the individual's welfare must, if necessary, give way.

Among relative theories, that which looks entirely toward the prevention of further offenses has sometimes been urged. That such a motive should be one of the determinant elements in any scheme of punishment is not to be denied, but in its application the sphere of ethics and law closely converge and are liable to be confused. The creation of proper motives manifestly falls within the field of the former and consequently the state has a very doubtful right to inflict a penalty before the commission of some wrong in order to create a motive which will tend to further its general safety at the expense of individual loss. It is, however, clearly within its proper field, if not indeed its duty, so to adapt its punishment of de facto offenders as to furnish a motive for obeying law to other possible law breakers. The two spheres are quite distinct and the functions of the state are legal and limited to the creation of motive only as incidental to actual punishment of crime already committed. Carried to the logical conclusion, the prevention theory would lead governments to investigate psychological traits and tendencies, and to punish a man for liability to temptation rather than yielding to it. It does not seem tenable save as an incidental result of the general theory of public welfare, furnishing a motive to others but none to a criminal.

The theory of punishment which finds its basis in public self-defense needs but little explanation. The state, as likewise an individual, undoubtedly has the right to ward off threatening injury, and in so doing may work a hardship to the individual justly, on the ground that otherwise a greater wrong would be committed. Punishment of crime, in so far as it operates as a deterrent on possible future offenders, is an indirect mode of self-defense and to that extent justifiable, but it is always to be remembered that the danger must be imminent and the harm done only to prevent a greater. In the consideration of this theory retribution is sometimes confused with self-defense. The mistake is natural, but the two should be carefully distinguished. The

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latter is protective in its nature, justifying the infliction of injury as a means of preventing other greater injury. The sinfulness of crime being publicly exhibited by means of the punishment, fear on the part of the public tends to restrain them from incurring on themselves consequences of a similar nature, and thus it is that one of the incidental effects of the penalty is to prevent and protect.

We have already commented on the theory which has for its object the reform of the criminal. It seeks to justify the punishment on the grounds of reforming the criminal. Alone the theory cannot stand, but as a relative part of the idea of punishment on the ground of public policy or expediency it has some weight. As a primary motive the state has within itself no right to consider the effect of the punishment on the offender; such humanitarian considerations must originate in the sphere of ethics, as before stated, although when possible the criminal's welfare is a matter for consideration, but must always be subservient to the welfare of the state. In this connection may be noticed that theory which seeks to restrain wrongdoers by inflicting so fearful and enormous punishments that it is not inaptly called by Wharton the terror theory. In effect it is nothing more than an exaggerated form of what is sought to be achieved by the inculcation of motive which we have noticed elsewhere. English and French history speak strongly for its inefficiency. It savors of rule by force rather than by reason, and in inflicting a punishment out of all proportion to the extent of the crime, forgets that "it is one of the highest prerogatives of justice to mould and explain it (i. e., the punishment,) so that it may conduce most to the prevention of crime on the part of the public as well as the criminal."

In conclusion it may be said that punishment is based on the highest form of justice and should tend to promote the greatest good of the greatest number. It should be inflicted only as a consequence of guilt and be proportional thereto. It finds its reasonable basis in the manifest duty of the state to provide for its own protection and welfare. Its justification is its evident necessity as a correlative of laws. In theory, at least, it should exemplify that "Charity for all, malice for none" which is the very keystone of all jurisprudence.

V. O. JOHNSTON.

A New York judge at a recent banquet said: "The law has degenerated into a mere trade," and this caused a sensation. It was an ugly slur at the trades.—Leader.

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

Probably no one condition will arouse the soul of man to action and fire his emotions quicker than the belief that injustice has been done. This love of justice, when once aroused, has engulfed thrones and empires in its sweep. Today France lingers dangerously near the volcano. Events of the recent past, acted out with all the color and passion of the French drama—this time in a high court of justice—signalize again the existence of that spirit of persecution which engrossed the Latin races in the days of the Inquisition. Even yet the world is hardly fit to live in. The partition between us and barbarism is very thin in some places. But in such times it seems good to live in a land where justice is "the hope of all who suffer and the dread of all who wrong." Can it be that the legal intelligence of France views the progress and outcome of the Dreyfus and Zola trials with no alarm? Editor Stead came strikingly near the truth when he declared that the French republic is a thing of the past. When the courts of a land are subservient to the vicious dictation of tyrannical power, then justice is a bastiled slave and law a hollow mockery. Outside of France no nation in the world believes in the guilt of Dreyfus. His conviction was the merest sham. Tried on trumped-up charges, given no hearing, sentenced without any opportunity to prove his innocence, and by a secret tribunal soaked in prejudice. This is what passes for French justice. It seems hard to believe that an enlightened nation in this age could tolerate such action. But what can

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be expected from a race of impetuous hotheads who slop over at every change of the wind and plunge madly after an idea like a flock of sheep thro' a hole in the fence.

When howling mobs gather around the court room and demand the life of one who has dared to raise his voice against an outrage, what regard may judges have for truth? This very spirit renders insecure the liberty of every Frenchman. While our judicial system is not above reproach, we may safely regard it as the friend of justice. A nation's strong right arm is in its judiciary, and when the germ of arbitrary law creeps in to "potrify the heart and putrify the brain," decay is the inevitable result. France has had revolution before—she needs it again. That this nation—leaders in finance and art—should throttle justice before the eyes of the world is one of the peculiar problems of this closing century.

The following order, important to those law students contemplating taking the June examination, has recently been made by the Supreme Court. The object, we understand, is to accommodate some of the law schools whose commencement will be held during the second week of June:

"On motion, and for good cause shown, it is ordered that the June examination of applicants for admission to the bar, be held, for the year 1898, and until otherwise ordered, beginning on the first Tuesday of June, 1898, instead of on the second Tuesday of said month, as provided in section 3, rule XIV. JOSIAH B. ALLEN.

Clerk, Supreme Court of Ohio."

* * *

We have received numerous requests to publish the Supreme Court examination questions. In obedience to that request, and by the permission of the examining committee, a portion given at the last examination will appear in this number. The remainder will be published in the two following numbers. If the plan should meet with the favor of our readers, we would be pleased to continue the publication of each set as fast as it appears.

* * *

The regular March examination of applicants for admission to the State bar was held in Columbus March 8th and 9th. One hundred and thirty-two candidates applied for admission, and out of that goodly number sixty-eight "passed": and sixty-four failed. That would indicate that the examinations are not so easy as they were once supposed to be. A casual perusal of the questions indicate that while by no means a "snap," they are eminently fair. Perhaps if the writer were compelled

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to reduce his answers to writing they might not appear in such a favorable light. The Supreme Court has certainly regarded its rules and appointed "nine discreet and judicious counselors-at-law, to be known as the standing committee on examinations."

"Mrs. Clara Foltz, of the New York Bar, is firmly convinced that there is at least one serious defect in our judicial system. While the criminal court is admirably equipped with machinery for the prosecution of offences, it is lamentably deficient, she believes, in the machinery for defence. The unfortunate prisoner who is unable to pay for counsel must expect to be prosecuted by the ablest of attorneys, backed up by all the resources of the State, and only too frequently to be defended, if at all, by a court appointee, who is wholly inferior to the men with whom he must cope. The remedy for this Mrs. Foltz finds in the creation of a new officer, to be called the Public Defender. She has formulated her ideas in a bill which is to be laid before the legislature of New York. It provides for the election to the office of an attorney at law in each county, whose duty it shall be 'to attend all criminal courts, and to appear for and defend all persons charged with violation of the law who are without counsel and who desire an attorney to appear for them.

"While an impecunious prisoner, whose case is tried in one of the smaller towns, where it will become matter of common talk among lawyers, is not likely to suffer for want of competent counsel to defend him, it is apt to be different amid the hurry and bustle of litigation in the large cities, where such things pass by unnoticed. Even there it may perhaps be doubted if substantial injustice is often done a prisoner under the present system. If he is not adequately represented by counsel, the average judge is likely to guard his interests well enough, if not to err on the side of leniency. It is an unpleasant position for the judge, however, and of course involves a departure from the strictly judicial function. Mrs. Foltz's idea certainly merits consideration."—Harvard Law Review, April, 1897.

The Rule in Schelley's Case—Judge Douglas of North Carolina pays his respects to this derelict in the following terms: "This single exception is the rule in Shelley's Case, the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous." Stamper v. Stamper (N. Car.), 28 S. E. 20.

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THE MOOT COURT RECORD.

PUBLISHED BY THE FRANKLIN BACKUS LAW SCHOOL—MOOT COURT RULES.

1. The Moot Court of the Senior class will be held at 11 a. m. on each Thursday during the first half year. The Moot Court of the Junior class will be held at 10 a. m. Wednesdays during the entire year.

2. Each student in the Senior and Junior classes will be assigned to do moot court work at least once during the school year, and his work upon such case or cases will be marked, and such mark will be taken into consideration in arriving at his general standing.

3. At least four weeks before the day set for hearing the presiding judge will give out statements of facts to each of the parties who are to act as counsel in a case, and upon these statements the case will be argued.

4. The counsel for the plaintiff shall file a written brief with the presiding judge at least ten days before the day set for argument, and the counsel for the defendant shall file his brief at least one week before the day set for argument. Counsel are required to prepare these briefs, not as written arguments, but as briefs properly speaking, i. e., a brief statement of the several propositions of law relied upon, followed by reference to a few authorities relied upon.

No brief will be received unless it is neatly and legibly written on one side of the paper only.

5. The presiding judge shall prepare a written decision upon each case, and shall read the same at the first or second session of the court held next after the argument of the case.

6. If any counsel thinks that justice has not been done he may give notice of appeal within one week after decision rendered, and the presiding judge shall appoint members of the faculty to act as appellate judges, fix a time for re-argument and give notice to the counsel when the case will be heard.

7. The statements of facts, briefs of counsel and syllabi of decisions shall be published in the Moot Court Record, which shall be printed weekly and distributed among the students on the mornings of days preceding arguments

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MOOT COURT CASE.

SENIOR CLASS.

JOHN HASKELL
vs.
THE L. S. & M. S. RY. CO. AND THE A. L. ANDERSON CO.

STATEMENT No. 6—FOR HEARING DEC. 2.

On Sept. 24, 1897, the A. L. Anderson Co. of New York sold to F. M. Bennett of Cleveland a bill of dry goods amounting to $825, and on the same day shipped them per freight to Bennett and mailed him a bill of lading for the goods. On Sept. 26 Bennett received the bill of lading and on the 27th came to the office of John Haskell, to whom he was indebted in the sum of $1,200, due Nov. 1, and offered to transfer the bill of lading to him in part payment of his claim. Haskell replied that he had no use for the dry goods and preferred to wait until the claim was due. Bennett replied: "I am seeing pretty hard times, John, and God knows I should hate to have you lose anything if I should be forced to the wall;" whereupon, without further conversation, Haskell agreed to take the bill, and Bennett endorsed it to him and took a receipt for $825.

On Sept. 28 the A. L. Anderson Co., being informed that Bennett is insolvent, which is true, stops the goods in transitu while in the possession of the L. S. & M. S. railway at Cleveland. On Sept. 30, Haskell demanded the goods but was refused, and now brings this action to replevy them.

C. L. STOCKER, for Plaintiff.
T. F. QUIGLEY, for Defendants.

PLAINTIFF'S BRIEF.

Under this form of action the question is one of title between the plaintiff as assignee of the bill of lading, and the defendant, The A. T. Anderson Co., claiming as consignor of the goods under exercise of unpaid seller's right of stoppage in transitu. The defendant, The L. S. & M. S. R'y Co., claim only a special property in the goods, holding as bailee.

The title to the goods follows the bill of lading:

Barber vs. Meyerstein, L. R. 4 H. L., 317.
The Thames, 14 Wall., 98.
W. U. R. R. Co. vs. Wagner, 65 Ill., 197.
First Nat'l Bank vs. Kelly, 57 N. Y., 34.
Heiskel vs. Bank, 89 Pa. St., 155.
Forbes vs. R. R. Co., 133 Mass., 154.
Amer. & Eng. Ency. of Law, vol. 2, p. 240.
Blackford on Sales, p. 297.
Garden Grove Bank vs. Humeston & Shen. R. R. Co., 67 Ia., 526.
Emery's Sons vs. Irving Nat'l Bank, 25 O. S., 360.
Cleveland Brown & Co. vs. Shoeman, 40 O. S., 176.

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Title was, therefore, good in F. M. Bennett, consignee, upon receipt of the bill of lading, and the title became good in plaintiff upon assignment of same in regular form to him, provided the title is not defeated by exercise of right of stoppage in transitu by unpaid seller, the defendant.

The right of stoppage in transitu may be defeated by an assignment of the bill of lading by the consignee to a person who takes in good faith and for a valuable consideration.

Lickbarrow vs. Mason, 2 T. R., 63.
Dows vs. Green, 24 N. Y., 638.
Rawls vs. Deshler, 4 Abb. App., Dec. (N. Y.), 12.
Becker vs. Hallgarten, 86 N. Y., 167.
M. C. R. R. Co. vs. Phillips, 60 Ill., 190.
Newhall vs. R. R. Co. vs. 57 Cal., 345.
Stanton vs. Eager, 16 Pick., 467.
Conrad vs. Atlantic Ins. Co., 1 Peeters, 386.
Benjamin on Sales, 1st Amer. Ed. Par., 862.

Plaintiff takes the bill of lading in good faith. Bennett was solvent; the transaction was of a sort usual among business men; there was no fraud or collusion; no bad faith.

Morgan vs. Hazlehurst, 53 Miss., 665.
Cuming vs. Brown, 9 East., 506.
Eaton vs. Davidson, 46 O. S., 355.

Plaintiff's mere knowledge that the goods have not been paid for or that Bennett was in shaky financial circumstances, is not sufficient to constitute him a purchaser in bad faith.

Daniel on Negotiable Instruments, Par. 1749.
Loeb vs. Peters, 63 Ala., 243.
Norton on Bills and Notes, p. 302 et seq.

Actual mala fides must be shown on part of assignee; mere failure to inquire into facts which ought to have put him on inquiry is not sufficient to constitute him a purchaser in mala fides.

Goodman vs. Simonds, 20 Howard, 343.

Even gross negligence in this regard is not sufficient to prove bad faith on the part of a holder of negotiable paper; a bill of lading is in some respects a negotiable paper.

Canajoharie Nat'l Bank vs. Diefendorf, 123 N. Y., 91.
Seybel vs. Nat'l Currency Bank, 54 N. Y., 288.

Plaintiff is a holder of the bill of lading for a valuable consideration, namely, the release of a valid inchoate claim.

Ames' Bills and Notes, p. 867.
Norton on Bills and Notes, p. 294.

The assignment to plaintiff was in consideration of payment of an antecedent debt. Payment of an antecedent debt is a valuable consideration for the sale of goods.

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Shanafelt vs. Pease, 16 Wis., 659.
Kranert vs. Simon, 65 Ill., 344.

Or for transfer of title to negotiable paper.

Swift vs. Tyson, 16 Peters, 1.
Carlisle vs. Wishart, 11 Ohio, 173.

Or for assignment of bill of lading.

Leask vs. Scott, 2 Q. B. D., 376.
R. R. Co. vs. Nat'l Bank, 102 U. S., 48.
Lee vs. Kimball, 45 Me., 172.
Paddon vs. Taylor, 44 N. Y., 371.
St. Paul Mill Co. vs. Despatch Co., 27 Fed., 434.
Davis vs. Russell, 52 Cal., 611.
First Nat'l Bank vs. Schmidt, 40 Pac. Rep., 479.

The right of stoppage in transitu is, therefore, defeated, and the title to the goods is indefeasible in the plaintiff.

The railroad company holding the goods merely as bailee for the true owner is bound to turn the same over to the plaintiff.

DEFENDANT'S BRIEF.

First defense:

The transfer of a bill of lading in mala fides between the assignee and his transferee does not defeat the consignors' or vendors' right of stoppage in transitu.

Rosenthal vs. Desseau, 11 Hun., 49.
II Kent Com., 550.
Martin vs. Roberts, 4 Burr., 2478.
Gibson vs. Carruthers, 8 M. & W., 346; 38 Conn., 490.

Actual and intentional fraud need not be proved.

Hennequin vs. Naylor, 24 N. Y., 139.
Jamison vs. McNally, 21 O. S., 295-304; 53 O. S., 253.
II Kent. Comm., 484.
65 Ala., 526, 541, 542.
Vertue vs. Jewell, 4 Chamb., 31.
Chandler vs. Fulton, 10 Texas, 20.

The burden of proof is on the party who claims the protection of a bona fide purchaser.

53 N. Y., 462.

Second defense:

The transfer of a bill of lading, according to the case at bar, was in consideration of an antecedent debt.

Legget vs. Bank of Sing Sing, 24 N. Y., 290.

One who takes property in payment of an antecedent debt is not protected as a bona fide holder for value according to the weight of authority.

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39 Am. Rep., 540.
49 N. Y., 286.
79 N. Y., 254.
18 Md., 496-500.
23 Cal., 359, 360, 362, 363, followed by 38 Cal., 584 and 55 Cal., 560.
Root vs. French, 13 Wend., 570; 5 Cow., 280.
Pope vs. Pope, 40 Miss., 516.
Poor vs. Farr, 25 Vt., 235.

An assignment of a bill of lading for an antecedent debt is not a sufficient consideration for an absolute transfer of the bill of lading so as to preclude stoppage in transitu.

L. R. 2 P. C., 393.
8 M. & W., 346.
10 Texas, 20.
Langdell's Summary on Law of Contracts.

DECISION BY J. FEAZEL.

Statement of facts appear in Moot Court Record No. 2, page 4, and the question in the case is whether the plaintiff is a bona fide purchaser for value, and, as such, entitled to the goods in question as against the vendor who has exercised his right of stoppage in transitu upon the insolvency of the vendee.

It is an undoubted right of the vendor of goods to stop them in transitu upon the insolvency of the vendee, and it is equally well settled that if he has given his vendee a bill of lading, which is evidence of title, and the vendee has negotiated this bill of lading to a bona fide purchaser for value without notice, he cannot exercise this right as against the bona fide purchaser.

A great deal was said at the argument about the burden of proof as to bona fide or mala fides. The general rule is that the vendor may stop his goods in transitu; the exception to that rule is that he may not stop them as against a bona fide purchaser who has relied upon the bill of lading given by him; therefore if the plaintiff is to maintain his claim to the goods he must prove that he comes within the exception to the rule, viz.: that he is a purchaser for value and in good faith.

53 N. Y., 462.
79 N. Y., 254.

In this case it is admitted that the consideration given for the bill of lading was credit on an antecedent debt. There has been a great conflict of authority as to whether the relinquishment of an antecedent debt is a valuable consideration. To us it seems that is the better rule which holds that it is. The creditor releases a valuable right against his debtor, and it might and often does happen that he could

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not be put in statu quo. But admitting that the plaintiff has given a valuable consideration for the bill, he will nevertheless fail to make out a case if he does not show that he acted in good faith.

The argument of defendant's counsel that the circumstances in this case were enough to show bad faith appeals to us very strongly. The facts that these were goods which the plaintiff did not usually deal in; that the consignee told him that he was seeing hard times and would dislike to see him lose anything if he was forced to the wall; that he had first told the consignee that he had no use for the goods and then agreed to purchase them, without any further questions or explanations after hearing this statement; that the consignee at once sold the goods without the least profit to himself, are all circumstances tending to show the absence of that good faith which the plaintiff must prove to establish his case. We believe that the right of stoppage in transitu is a very just and equitable rule, and that it should not be defeated unless its exercise will work injustice and be inequitable. This does not seem to us to be such a case, not only because of the facts mentioned above, which tend to show want of good faith, but because the plaintiff surrendered no valuable right, and if the goods are returned to the vendor will be in no worse position than he was before, for notwithstanding he relinquished a claim against the consignee, it was a claim not yet due and on which he might not have sued before the insolvency of the consignee occurred. We therefore think judgment should be for the defendant.

SUPREME COURT OF OHIO LAW EXAMINATION.

MARCH 8, 1898.

WILLS.

1. Upon application for the probate of a will the subscribing witnesses testified that the testator requested them to witness his will, that he signed the same in their presence, while confined to his bed by sickness and handed it to them to sign as witnesses. That they took the will to an adjoining room, placed it upon a table there and signed the same as witnesses; that the testator did not and could not have seen them or the will when they were in the act of signing as such witnesses. That at the time said testator so signed the will he was of full age, of sound and disposing mind and memory and under no restraint. Could the will be admitted to probate, and why?

2. A father by will devised his real estate as follows: "After my debts are paid I give and bequeath my real estate to my wife, Mary, for life. After the decease of my wife I give and devise all of said real

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estate to my two sons, William and Henry, to them, their heirs and assigns forever. It is my will that if either of my said sons, William or Henry, shall happen to die before my said wife Mary, then it is my desire that the survivor at her decease shall have the whole of the property, to him and his heirs and assigns forever." When did the remainder vest in the two sons, and could William in the lifetime of Mary convey by deed all his interest in the land to Henry?

3. Is the following provision in a will valid and binding: "Now, if any of my heirs are dissatisfied and go to law to break this will, then my will is, and I direct, that they shall have no part of my estate, and I debar them from any part of my estate whatever."

4. In what order will the law construe a limitation in a will as between a vested remainder, a contingent remainder and an executory devise?

5. In the case of a foreign will devising lands, situated in this State, is its construction to be governed by the laws of the testator's domicile, or by that of this State in which the lands devised lie?

6. Who may make a will in Ohio, and how should a will other than a nuncupative will be made, signed and witnessed?

CONSTITUTIONAL LAW.

7. Name the qualifications required by the United States constitution for eligibility to the office of President of the United States.

8. Give the substance of the U. S. constitutional provisions as to the impeachment of the President of the United States.

9. What difference is there in the power of Congress to pass valid laws under the United States constitution, and the power of the State Legislature to pass valid laws under the Ohio constitution?

10. Suppose the Legislature of Ohio should pass a law making the individual liability of stockholders in Ohio corporations an amount equal to five times the amount of stock owned by them. Would such a law be constitutional? Why?

11. Can a person, indicted for murder in the first degree, be admitted to bail under the Ohio constitution? Give the substance of the provision.

12. What courts are established by the Ohio constitution, and can the Legislature establish courts? Answer fully.

REAL PROPERTY.

13. What is an escrow? Let your definition show every element necessary to a valid escrow.

Does or not an escrow pass a present interest to the grantee?

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14. Mr. Hayseed being about to buy a farm employs you to examine the records of the county to see whether it is free from encumbrances. What ones of the country offices would you visit, what records would you examine in each, and what kind of encumbrances would you look for?

15. What is a fixture? Give the tests by which to determine whether a thing is a fixture or not.

16. What is meant by words of limitation in a grant? Give an example.

17. Y leased from W a lot in the town of N. for a term of years. Y erected a fence on the lot at his own expense under an agreement with the landlord that he should have the right to remove it. Y's term expired April 1, 1896, at which time he left the premises and surrendered possession but did not remove the fence. In March, 1897, he returned and tore down and removed it. W sues him for the value of the fence. For whom would you give judgment? Give your reasons, and the rule that applies in such cases.

18. F conveys a tract of land in Ohio, by deed, to his daughter A. T. "during her natural life and then to the heirs of her own body forever." A. T. died, leaving five children. One of the sons, W. T., procures quit-claim deeds from his brothers and sisters for their interests and then consults you as to the kind of an estate he has in the land. What would you advise him? Give reasons.

AGENCY.

19. An agent was directed to sell goods, as goods of his principal for cash. The agent sold them, taking a check payable the day after the sale, which was the customary way at the place of sale for making what was there called cash sales. He also warranted the title of his principal.

(a) Had he the right to make the warranty?

(b) Had he the right to take the check? Give reasons for answers.

20. Supposing that the agent in the foregoing question had been specifically instructed, by his principal, to sell for cash and transmit the money by express; and instead he sold for cash and purchased a check drawn by the parties then in good standing and credit in New York and sent the same to his principal, who forwarded it to New York for collection, but before it was cashed the drawers had become insolvent and the check was dishonored. Was the agent liable, or was there such a ratification of the acts of the agent, by the principal, as to cause the loss to fall on the principal? Give reason for answer.

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21. An agent in good faith, but erroneously, believing himself authorized, assumed to deal with a third person as one authorized to act for a certain principal. He made no express representations as to his authority.

(a) Is the agent personally liable?

(b) If so, to whom, for what and why?

(c) If not, why not?

22. When, if ever, can an agent act after the death of his principal?

23. A person indorsed and delivered a promissory note for the purpose of collection. Can the agent sue on the note after the death of his principal? If so, how and why? If not, why not?

24. H, with the consent of C, acted as agent for both C and D in an exchange of lands between them; but it did not appear that D knew that H was agent for C. Can H collect his commission from C? Can he collect his commission from D? Give reason for answer.

NEGOTIABLE INSTRUMENTS.

25. What requisites must commercial paper possess in order to be negotiable? Write a negotiable bill of exchange, indorsed by the payee in blank, in such manner as to avoid the usual liability of an indorser.

26. A negotiable promissory note, by its terms bearing interest from date at a specified rate, is signed as maker by a resident of West Virginia in the State of West Virginia, and in said State is delivered to the payee, who is a resident of Nebraska, for a loan of the principal sum of said note, then and there made; the note is dated in West Virginia, and by its terms is payable at the residence of the payee in Nebraska. The note is not paid at maturity, and the payee sues the maker upon the note in a court in Ohio having jurisdiction of the subject matter and of the person of the defendant. A defense is made by the maker that the rate of interest the note calls for is usurious. By the laws of what State is this question to be determined, and why?

27. What must be done by an indorsee of a negotiable promissory note in order to hold his indorser, who has not waived any rights as indorser, where the indorsement was prior to maturity? What must such indorsee do to hold his indorser where the indorsement was after maturity?

28. A negotiable note, due two years after date, bears interest at eight per cent., payable annually. No payment whatever is made upon the note until its maturity, when the maker pays the payee one-half the amount of the principal of the note. How should the payment be credited?

29. Where usurious interest has been paid, can the excess above

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the legal rate be recovered back? Can such excess be credited on the principal?

30. The payee of a note indorses it for value, before maturity, to a person who has no knowledge of a defense which can be made by the maker to an action on the note by the payee. Such indorsee indorses the note, for value, before maturity, to a person who has knowledge of such defense at the time of his purchase of the note. In action by this last indorsee against the maker, can the defense mentioned be set up by the maker?

RECENT CASES.

EVIDENCE—DECLARATIONS OF PHYSICAL CONDITION.—Declarations by the plaintiff of his symptoms made to a physician with a view to obtaining his opinion as witness for the plaintiff, are inadmissible. Lambertson v. Consolidated Co., 38 Atl. Rep., 683.

The ground upon which the court bases its decision is that when desiring the opinion merely of the physician, all incentive to speak the truth is gone. which is the ground of admitting it when treatment is the object.

Although some states are inclined to thus narrow this exception to the hearsay rule, it is submitted that the better rule is as laid down in Greenleaf §102—namely, that declarations of physical or mental condition made to anyone are admissible as evidence of such condition.

TELEGRAPH COMPANIES — RULES ON BACK.—A rule on the back of a telegram, to the effect that all claims for damages must be presented within 60 days, is not binding upon the receiver, unless he assented thereto. Webb v. Western Union Co., 48 N. E. Rep. (Ill.), 670.

The authorities in this country generally agree with this case. They base their decision on the ground that the company's duty to the receiver arises not out of contract, like that between the company and sender, but is imposed by law. The receiver's remedy being in tort, it can be brought within the time allowed by the Statute of Limitations.

SALES—SHIPMENT OF LIQUOR C. O. D.—The buyer, living in a prohibition section, ordered liquor from a licensed dealer in another section, to be sent C. O. D. He paid the price on arrival and took possession. Held: There was no violation of the statute of the prohibition county. James v. Commonwealth, 42 S. W. (Ky.), 1107.

This is one of several decisions on the same subject, not entirely in accord. It is submitted that the above is a sound decision.

Transfer of title to personal property passes according to the intention of the parties. Without contrary evidence it is presumed to pass with delivery to the carrier. The words C. O. D. merely indicate a desire to control possession, not title. The transfer and sale therefore took place in the county in which the seller resided.

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Ohio Digest.

(Reported to March 1).

Amendment. An amended petition may be filed by a plaintiff changing the cause of action from an equitable to a legal action; in such case the court will look wholly to amended pleading and disregard original. Petition asking for recovery of land, though including a prayer for injunction, presents a case for jury and is not appealable. 57 O. S. A., 271.

Appeal. Where one who is party to an action is in a fidiciary capacity, appeals from a judgment, affecting his own pecuniary interests adversely, such appeal is not "in the interests of the trust," and appellant must give bond. §6408, R. S.; 57 O. S. A., 289.

A party may not invite a court into error and then attack the action of the court in a court of review; doctrine of estoppel applies. 5 O. N. P., 61.

If in an action to foreclose a mortgage and for a personal judgment, journal entry shows withdrawal of prayer for personal judgment before trial, mortgagor may appeal. 39 B., 109.

Appeal from Common Pleas to Circuit must be taken as provided in §§5227, 5228 and notice of appeal entered on record within three days after entry of judgment. 57 O. S. A., 234.

Overruling demurrer with leave to answer is not a final order to which error will lie. 15 C. C., 199.

Assignment. Kentucky statute, whereby a preferential conveyance operates as an assignment in trust for benefit of all the creditors, has no extra-territorial effect. 5 O. N. P., 57.

Bill of Exceptions. Where journal entry shows that bill was not presented to trial judge within time prescribed by statute, it will on motion be striken from the files; statement contained in an endorsement on such bill made by judge as to time of receipt is unauthorized and cannot be considered. 8 O. C. D., 60.

Common Carrier. Where contract of carriage agrees upon a valuation of property and rates are based on condition that carrier be liable only to extent of valuation, shipper in case of loss by negligence cannot recover more than agreed value. 15 C. C., 123.

Constitutional Law. Act (92 O. L., 262,) relating to house draining and plumbing is unconstitutional. 5 O. N. P., 46.

Act (92 O. L., 441,) to regulate practice of medicine is constitutional. 7 O. D., 52.

Act for suppression of mob violence (92 O. L., 136,) is unconstitutional.

Construction of Statutes. In R. S., §1380, which authorizes council of a municipal corporation to petition county commissioners for annexation of part of one township to another, word "council" includes trustees of a hamlet. 8 O. C. D., 24; 15 C. C., 81.

Contracts. A contract in consideration of marriage whereby parties agree to keep their estates separate after marriage, husband agreeing not to claim curtesy or homestead in wife's land, and wife releasing her right to dower, homestead and year's allowance for support out of his estate, is valid and bars action to recover the above allowance. 5 O. N. P., 39.

Contract of compromise between the heirs and devisees of an estate is favored in law and is not subject to objection from a party who at time of making contract was fully aware of condition of such estate. 5 O. N. P., 63.

Where no time is agreed upon for the completion of performance of a contract, it must be completed within a reasonable time; whether reasonable or not, is a question for jury. 5 O. N. P., 67.

In Ohio, law of the place of performance governs construction of contract. 15 C. C., 123.

Corporations. Where stockholder of corporation has been denied right to inspect books, his remedy is mandatory injunction and not mandamus; right of examination by stockholder includes right of examination by attorney or agent. 5 O. N. P., 71.

A committee empowered by corporation to sell issue of bonds has power to

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employ broker in that behalf, and broker so employed may recover of corporation reasonable compensation. 15 C. C., 181.

An electric light company owning plant and furnishing light to city has so far devoted its property to public use that it is bound to furnish light to all applicants in city at a reasonable price. 39 B., 84.

County Auditor. When not entitled to extra compensation an allowance of illegal claims by county commissioners is void, and presentation of such claims and receipt of money thereon by auditor constitutes a breach of the condition in his bond providing for faithful discharge of duty. 57 O. S. A., 189.

County Commissioners. May not expend more than $10,000 in improvement of a court house where such improvement amounts substantially to erection of a new building, without submission to a vote of people, and a sale of bonds for such purpose will otherwise be enjoined. 7 O. D., 34.

Criminal Law. Corpus delicti of a crime cannot be established by confessions alone but the latter must be corroborated by other evidence. 7 O. D., 84.

Indictment under §2573, R. S., for failure to remove explosive must aver that order was issued by district inspector of workshops and factories appointed by chief state inspector. 8 O. C. D., 49.

Evidence of other transactions than those described in indictment is not admissible. 15 C. C., 13.

Deed. A deed from parent to child "in consideration of love and affection and in consideration of dutiful obedience and faithful service, and in further consideration of $1," is not a deed of gift, and child takes by purchase. 39 B., 129.

Descent and Distribution. Where husband devises all his estate to wife and will is duly presented for probate, but widow dies intestate before will is admitted to probate, the property descends to heirs of widow, although no election by her is shown to take under the will. 15 C. C., 141.

Easement. Alley way adjoining land sold, which is expressly excepted from sale, may be closed by owner.

Evidence. Non-expert may give opinion as to mental condition only after he has testified to facts throwing light on mental condition and forming basis of his opinion. 15 C. C., 133.

A party calling a witness supposed to be adverse in anticipation of his being called by other side, may not cross-examine him or elicit answers otherwise incompetent, with view to impeachment of the witness. 15 C. C., 133.

Jurisdiction of court of another state having been proved without objection, the duly attested and certified transcript of the record of a judgment of that court is competent evidence to prove such judgment. 15 C. C., 181.

Exemption, Homestead. The concealing and withholding of property before levy of a value equal to that exempted by law will be construed as a selection to hold such property as exempt and debtor is estopped from afterwards claiming other property levied upon in addition. 7 O. D., 98; 5 O. N. P., 90.

Insolvency. Where assets of an insolvent partnership are insignificant and there is no living solvent partner, the partnership creditors may share pro rata with separate creditors in the individual estate. 5 O. N. P., 52.

Funds of an insolvent estate in hands of administrator are subject to taxation. 5 O. N. P., 52.

Insurance. False answers inserted in application, known to agent to be false, no defense to action on policy, even though there was collusion between agent and insured. 15 C. C., 62.

Lease. Lease of all coal underlying certain lands so long as coal is found in paying quantities; if holder of lease fails to work the mine for 11 years and openings to mine cave in, the lease may be assumed to be abandoned. 5 O. N. P., 50.

Libel. Mere mailing of postal card not a publication when language used is not libelous in itself; allegations and proof must show that person to whom published, from knowledge of extraneous facts, might have understood it in a libelous sense. 15 C. C., 52.

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License. Parol license executed is irrevocable if supported by valuable consideration. When license is for benefit of property of licensee, the license is assignable. 15 C. C., 118.

Mandamus. Action will not where there is no office, trust or station which law enjoins on defendant. The acceptance by street railway of conditions of an ordinance or of franchise granted by county commissioners constitutes a contract which gives a remedy at law against the company, and mandamus will not lie to compel them to keep in operation a certain part of line. 15 C. C., 20.

Mortgages. Mortgages of equitable interests must be executed and recorded as provided in §§4106, 4133, R. S.

Municipal Corporations. In requiring railroad company to light track through city may prescribe the kind of light. 39 B., 84.

A councilman during his term of office is ineligible to office of member of board of education. 15 C. C., 163.

In proceeding to authorize issue of bonds, resolution by city council for that purpose is of a general nature and within §1694, R. S.; purchase and erection of waterworks cannot be combined in one resolution; nor can council delegate authority to sell bonds to mayor in contravention to §1837, R. S. 39 B., 132.

Mayor in cities not having police court has final jurisdiction in cases of misdemeanor within county in which accused is not entitled to a jury. 5 O. N. P., 81.

Navigable Waters. The public has the right of navigation and fishing in the navigable water of the open bays of Lake Erie. 57 O. S. A., 226.

Notice. Proof that notice of an order was written and enclosed in a sealed envelope, properly stamped and addressed and placed in hands of private messenger to be mailed, is not sufficient proof of service of notice. 8 O. C. D., 49.

Partnership. Death of a partner immediately dissolves partnership, and a continuation of business by surviving partner and executrix in pursuance of agreement is a new partnership, terms of which may be implied to be same as those of former partnership. 39 Bull., 119.

A partner does not have implied authority to make a final disposition of the property of the firm by chattel mortgage or otherwise, the effect of which is to terminate the partnership, without consent of co-partner. 39 Bull., 119.

Pleading and Practice. In action for damages for breach of warranty, where petition alleges that defendant knew warranty to be false, plaintiff may recover on proof of warranty and the breach, though he fail to prove scienter. 57 O. S. A., 240.

In prosecution under act to regulate practice of medicine it is not necessary to make negative averments in information governing the exceptions provided for in that act; in such prosecution not competent for defendant to show error in board of examiners in refusing him a certificate. 15 C. C., 73.

If bill of exceptions not presented to opposite counsel for examination and to trial judge for signature within time limit, judge loses his jurisdiction in the subject matter. 39 B., 81.

If defendant in an action appear and makes motion to separately state and number or to strike out, he may not afterwards object to jurisdiction of court. 39 B., 81.

Prescription. Bridge over canal of a defendant erected by plaintiff's grantors and having been used for 21 years, plaintiff has right to have it remain. 15 C. C., 118.

Public Officer. A fireman, city light trimmer and engineer, employed by city, are not public officers against whom quo warranto will lie. 39 B., 147, 156.

Quo Warranto. Suit in, merely asking that city be ousted from the power by its council to adopt a certain ordinance, will not lie. 39 B., 157.

Receiver. Right to change person who is receiver rests in discretion of court and will not be interfered with except for abuse of discretion. 5 O. N. P., 61.

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Street Railroads. Arrangement by one road allowing another to use its tracks will not be invalidated by an arrangement of such other road with a third road for use of latter's track if number of cars to be run over tracks of first road is not unreasonably increased. 15 C. C., 190.

Surety. Not competent for surety to show an understanding that his undertaking was to be avoided, unless principal indemnified him within five days after delivery of the undertaking. 57 O. S. A., 299.

Surety cannot question the validity of a judgment against his principal except on grounds of fraud or mistake. 57 O. S. A., 299.

Taxation. Association organized for public charity as a camp-meeting will not have its property subjected to taxation, though it makes charges on those attending meeting for use of certain privileges. 57 O. S. A., 257.

Tax Sale. To be valid all requirements with reference to collecting and levying taxes must have been followed by all officials having any duty to perform in relation thereto. If sale is invalid for irregularity, purchaser cannot recover any penalty or costs incurred in suit. 15 C. C., 149.

Trust. Where husband and wife live on wife's land and cultivate the same, wife pocketing proceeds as her own, to which husband consents, he cannot afterwards claim money as held in trust for him. 5 O. N. P., 89.

Wills. Fact that will is partly written and partly printed does not invalidate. 15 C. C., 133.

A will making bequests to testator's grandchildren "now and hereafter born" does not include in such provision children born after testator's death. 5 O. N. P., 73. 7 O. D., 105.

Common law rule that marriage alone does not revoke will of husband made before marriage is not abrogated in Ohio by reason of statute making husband and wife heirs of each other. 8 O. C. D., 44. 15 C. C., 155.

Charitable devises, failing, inure to benefit of residuary legatee and not heir-at-law. 8 O. C. D., 52.

Where will gives a life estate to wife, on her death, to two of the children jointly for life and on their death remaining estate to be sold and equally divided among the other children, the last devisees get a present vested interest on the death of testator. 7 O. D., 91.

BOOK REVIEW.

THE LAW OF WILLS. By Melville M. Bigelow, Ph. D. Boston: Little, Brown & Co. 1898. pp. xxxii-398.

This latest and long-expected book in The Students' Series supplies a long-felt want. While the average law student has felt the importance of the law of testamentary disposition, there is hardly another branch of the law which he has found so dry and uninteresting, because in studying the works upon that subject he has been obliged to struggle through voluminous elaborations in which the ancient and the modern law, the general rules and the rules of various jurisdictions are all stated in such an illogical and confusing manner as to leave him hopelessly bewildered.

This little book is, in its concise, systematic and logical statement of the law, a boon to students, for whom it is particularly designed, and will also be a great help to teacher and practitioner. There is not an unnecessary or useless word in the book, for while everything is set forth in the clearest and most systematic and logical manner, no unnecessary words are used.

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One feature of the book that cannot be too highly praised is the evident care with which citations have been made. Instead of citing a great number of cases, half of which have no bearing upon the point for which they are cited, as is too frequently the case in these days of cheap text-books, the author has limited his citations to one or two of the strong and ruling modern cases upon each proposition.

Another commendable feature is the fact that while such parts as those dealing with the history and theory of post-mortem disposition and the nature and elements of a will, which are comparatively simple and easily understood, are set forth clearly, there is no needless elaboration; but when the more difficult subject of testamentary construction is taken up, the author gives it particular attention and treats it with such minuteness and care that the publishers' claim, that nowhere else has construction been so thoroughly and clearly discussed and explained, is well founded and not at all extravagant. It is a book which every student should possess.

E. A. F.

ACCORD AND SATISFACTION.

(Harvard Law Review).

In a recent case, of Clayton v. Clark, 21 So. Rep. (Miss.), 565, the Supreme Court of Mississippi has rejected the authority of the much quoted dictum in Pinnel's Case, 5 Rep., 117a, to the effect that a lesser sum cannot be satisfaction for a larger debt already due. The exact nature of the case under consideration is not made quite clear; but it seems that the defendant paid a smaller sum for a larger debt then payable, and that the plaintiff accepted it in full satisfaction of the debt. This is the construction put upon it by the court; and thus the question popularly supposed to be involved in Pinnel's Case is directly raised.

It cannot be denied, that the Mississippi court has ignored authority. If, however, this neglect can be condoned, it must be admitted that a healthy conclusion has been reached. There is much force in Lord Blackburn's view (see Foakes v. Beer, L. R. 9 App. Cas., 605,) as to the possible benefit to the creditor who accepts the smaller sum, especially if the debtor is in danger of insolvency. Moreover, an analogy may be drawn with the rule of the law of contracts, whereby one party who has waived performance by the other is estopped from complaining of the consequent breach. There seems to be no reason for making a distinction when instead of a contract obligation there is a debt, and the creditor waives payment as to a part of it by accepting the smaller sum in full satisfaction. He should not afterwards be heard to complain of the non-payment of the remainder.

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MAILING AN ACCEPTANCE.

The time when the acceptance of a contract by mail takes effect was held by the Quebec Court of Queen's Bench in the recent case of Underwood v. Maguire, Rap. Jud. Quebec, 6 B. R. 237, to be the time when the latter was received, and not the time when it was mailed. The majority of the court bases this decision on the proposition that there was never a final and definite agreement to which both parties at a given time gave their consent, as a letter revoking the offer had been mailed before the acceptance was received. It cites the French case of de Marans v, veuve Deschamps, decided by the court of appeal of Orléans, also Baudry-Lacantinerie, vol. 2, section 797. But two judges dissent, and the dissenting opinion declares that it is a fact of great importance that the jurisprudence of England and the United States, the greatest commercial countries of the world, adopts the contrary doctrine.

In Massachusetts the case of M'Culloch v. Eagle Ins. Co. 1 Pick. 278, reached the same conclusion as that adopted by the Quebec court. But it is conceded by the Massachusetts court that in England, New York, and New Jersey, and in the Supreme Court of the United States the opposite view has prevailed and the contract deemed to be complete as soon as the letter of acceptance has been put into the post-office duly addressed. Except in Massachusetts this seems to be the generally accepted law of the United States as well as of England. But the case of Lewis v. Browning, 130 Mass. 173, holds that the party making an offer may properly stipulate that the acceptance must actually reach him before he shall be bound thereby. It is always possible, therefore, for a party making an offer to preserve the right of revocation up to the moment that he actually receives the acceptance. *Exchange.*

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THE

WESTERN RESERVE LAW JOURNAL

Vol. IV APRIL, 1898 No. 3

Recollections of the Bench and Bar in Central Ohio Forty Years Ago.

By MARTIN WELKER.

IV.

Early in the fifties quite a celebrated trial occurred in the Court of Common Pleas at Wooster, not so much for the character of the case itself, but of the lawyers engaged in the trial. It was a suit by Hiram Wellman against the Pittsburgh, Ft. Wayne and Chicago Railroad for personal injuries in putting him off a train. I tried the case as judge to a jury.

The lawyers engaged in the trial were Hon. Thomas Corwin, Judge David K. Carter, Judge Rufus P. Spalding, Judge Levi Cox and John McSweeney.

During the trial the court room was crowded, all anxious to see and hear these distinguished lawyers. It was truly a battle of giants in the law.

It would take too much space to give a statement of the case or the substance of the speeches made. My purpose is only to note some of the characteristics of these noted attorneys. Scarcely could be found an equal number of men so different in their personal make-up and acquirements, and who have made so distinguished careers.

Corwin was in manner one of the most unassuming, genial, polite, social and pleasant men I have ever met. His good humor enabled him at all times to attract the attention of his hearers. He had a wonderful store of anecdotes and wit at his command, and used them with great effect in his speeches. In his palmy days, from 1840 to 1860, he was, in fact, the greatest platform orator in this country or any other country in the world. No man in olden or modern times was his equal in that respect. He was a man of great ability, also a good lawyer, of extensive and varied practice, great and broad general information, and always commanded the attention of court and jury.

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In this case he was eloquent, logical, convincing, and completely captured the audience and also the jury. He only argued the facts, leaving the question of law to his associate, remarking that he did not know the law so well as his young associate.

I need not remind the reader that he had been governor of Ohio, senator of the United States, and afterwards secretary of the treasury and minister to Mexico.

Carter had been in congress, where he had made a fine record, but as a Democrat he became noted for voting for the Wilmot proviso. He afterwards was appointed by President Lincoln chief justice of the District of Columbia, where he won great distinction as a judge, and died in the harness. He was also a good lawyer and a strong and eloquent speaker. Possessed of great common sense, he was rough in his manners and deportment, stammered in his speech just enough to make it interesting to listen to him, and always made an able and strong speech to the jury. He never stopped to find smooth phrases to describe things to a jury, but indulged largely in the slang of the times to present his client's case. In this case he made a biting speech, full of sarcasm and wit, bristling with strong points.

Spalding was entirely different from Carter in almost every respect. A fine scholar, great culture, precise in language, using the purest Saxon, with finely constructed sentences, his speeches were models of elocution. He never indulged in slang or wit. He was a great lawyer, well posted in the decisions of the courts, always treating the court with great respect, and counsel engaged in the trial with courtesy and as gentlemanly associates. In this case his speech was an able one—a model in forensic discussion.

He had been chief justice of the State, a Democrat in politics, and afterwards a Republican member of congress for six years from the Cleveland district, where in three congresses I had the pleasure of serving with him.

Judge Cox was a mild-mannered man, a good lawyer of long practice, had been my immediate predecessor on the bench—a cultured gentleman in his deportment, a good speaker, and one in whom juries had great confidence.

John McSweeney was then a young man of great promise—aggressive, eloquent, full of energy, good culture, wide reading and very familiar with the elementary principles of the law. He possessed great energy of character, with high ambition in the line of his profession, from which he was never diverted by flattering offers of political preferment. He was a combination of the roughness of Carter and the culture of Spalding, using both styles of elocution in his speeches. His speech in this case compared favorably with the great

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speeches of the others. In after years he became one of the most eloquent and great lawyers of the State and nation.

In personal appearance Corwin was of dark complexion, full face, good figure, with an eye in which you could see fun and good humor; always neat in dress and habits.

Carter was also of dark complexion, large frame and heavy in build; was pock-marked in face, and exceedingly negligent in his dress and habits.

Spalding was fair in face, careful of his personal appearance, always cleanly shaved and well dressed.

Cox was a bachelor, of medium size, always neat and cleanly in his dress and personal habits.

McSweeney in person was tall and a model of form, sandy hair and beard, and generally not very particular about his dress.

All these men have gone to the "Higher Court."

At a reception given to Ohio people at Washington by Col. Wetmore, then Ohio agent, in December, 1865, a large number were present. Hon. Thomas Corwin was there, and was in unusual good spirits, and seemed to be glad to meet so many of his Ohio friends; among others, the whole congressional delegation, with Chief Justice Chase, Postmaster General Dennison, Secretary Stanton and Chief Justice Carter, and many other Ohio men then in the city, were present. Whilst at lunch Corwin was sitting on a sofa and was giving us a very interesting and amusing account of leaving the City of Mexico as our minister there. Chase, Dennison, Sherman and Garfield standing in front of him, one or two sitting beside him on the sofa, I was sitting on the end, when suddenly he threw up his hands and fell back insensible, having a stroke of paralysis. He did not rally, and died the next day, December 18, 1865. Our party immediately broke up, sadly realizing that a great man had fallen.

So three of us, Carter, Spalding and myself, witnessed the end of a fourth one, of those who figured in the celebrated trial noticed in this sketch.

The Rights of Newsboys.

The judgment comes from the District Court at the National Capital that the sale of newspapers on the streets is a legitimate business, and that newsboys have a right to enter street cars and sell papers to passengers provided they behave themselves and leave the car when their business is finished. One newsboy was forcibly ejected from a car in Washington some time ago and had a leg crushed by a car running on the other track. He has just obtained an award of $5,000 damages from a jury under instructions to the above effect by the Judge.—Legal Adviser.

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Status of a Married Woman at the Common Law.

II.

(Portion of a Lecture delivered by E. H. Hopkins before the Junior Class of the Women's College of Western Reserve University.)

Let us now consider the position of married women at the common law in relation to the acquirement, holding and enjoyment of property.

First—As to real property:

Immediately upon marriage the husband became entitled to the use and occupation and rents and profits of all real property which the wife owned at the tim e of the marriage, or which she acquired after marriage, no matter how acquired for the term of their join lives, and if a child were born of the marriage alive, the husband was entitled to full control and enjoyment of his wife's real property during his natural life.[1]

Nor was the husband restricted simply to the enjoyment of the use of the land. He could sell his interest in the land and so transfer the use and enjoyment of it to strangers even though it resulted in depriving his wife of her home. Moreover, his creditors could seize the land in satisfaction of his debts and so deprive him and his wife of the enjoyment of their home or other land during the period of their joint lives or if a child had been born of the marriage the creditors could hold the land during the natural life of the husband. Upon his death the wife or her heirs could again retake possession of the lands but not before.

Again the husband could commit any waste that he desired upon his wife's land and she was without a remedy against him; e. g. he could cut down all the trees upon the land; he could remove or destroy all buildings upon the land or otherwise misuse the land so as to reduce its value. But in modern times Courts of Equity have restrained husbands from committing such waste.[2]

Secondly—As to the husband's rights in his wife's choses in possession, i. e. tangible personal property.

Immediately upon marriage the husband became absolute owner of his wife's choses in possession; e. g. horses, carriages, furniture, dresses, etc. It made no difference how the wife acquired such property, whether by will, or by gift, or by purchase, it all immediately vested in her husband upon marriage, and this was true even though the property was given to her in the way of presents by her husband during courtship. If a suitor was confident that the young lady would marry him he could very well afford to give her expensive presents, because as soon as they were married these

(1) Kent Com., Vol. II, 128.
(2) Kent Com., Vol. II, 181.

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presents all came back to him, unless, perchance, she had disposed of them. If he died the very moment after the marriage ceremony was performed, the property so acquired by marriage descended to his next of kin, and his wife had no interest whatever in it except as to her own personal clothing and ornaments—paraphernalia. But this was by no means the greatest hardship upon his wife. The very moment after the marriage ceremony was performed the husband's creditors could seize all this property and they could even seize the wife's wedding trosseau.[3] This was true even though the husband had faithfully promised his wife before marriage, or had solemnly covenanted with his wife's parents or other friends that the property should continue to be his wife's after marriage, and that she should have absolute control over it.[4]

The only way in which the wife's interest could be protected in such a case was to transfer the property to some third person to hold for the benefit of the wife.

Not only did the husband acquire ownership in the choses in possession, of which his wife was possessed at the time of marriage but he also acquired absolute title to all choses in possession acquired by her during marriage no matter how acquired. In the year 1835 a case was tried in England in which the husband claimed £500 in money which his wife had accummulated during a long period of time in which they had not been living together. During all this time the husband had done nothing whatsoever for the support of his wife but he was nevertheless given the money by the court.[5] Of course the creditors of the husband could also have claimed this fund of money and the wife would have been equally helpless. Until the marriage relation was dissolved either by death or by law, the husband and his creditors were entitled to his wife's earnings as well as all the other choses in possession.[6]

Thirdly—As to the wife's choses in action, *i. e.*, intangible property, and the husband's power over them.

Immediately on marriage the husband acquired the right to convert his wife's choses in action into choses in possession, and these choses in possession he owned absolute; *e. g.* he had a right to collect and receipt for all debts due to his wife, and if the wife's debtors paid the money to his wife, the husband could compel him to pay a second time. Promissory notes, or bills of exchange, which were payable to the wife, the husband could endorse, transfer and sell to other parties or collect from the maker or drawer. And here again

(3) Kent, Vol. II, 143. Carne vs. Brice, 7 M. & W., 183 (1840).
(4) Izod vs. Lamb, 3 C. & J., 35 (1830).
(5) Agar vs. Blethyn, 2 C. M. & R., 699 (1835).
(6) 119 Mass., 596 (1876)

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the maker of the note, or drawer of a bill of exchange, paid the wife at his peril. The husband could collect a legacy bequeathed to his wife by will and if the executor paid the money to the wife the husband could compel him to pay a second time. If the husband himself had been indebted to his wife before marriage the debt was extinguished upon marriage.[8]

But if the husband wished to deprive his wife entirely of all her interest in her choses in action he must convert the choses in action to choses in possession during his life time. If the wife survived her husband and some of her choses in action had not been reduced to possession, then such choses in action reverted to the wife and did not vest in the administration of the husband's estate. If the husband survived the wife and he had failed to reduce to possession some of her choses in action during her life, he could as his wife's administrator reduce them into possession and appropriate the proceeds to his own use.[9]

To constitute a sufficient reduction in possession by the husband he must either have collected the amount of the debt from the principal debtor or have sold the claim to some third party or have extinguished it by taking a new promise from the debtor to himself for the payment of the debt.[10] If the husband made an assignment for the benefit of creditors, his assignment carried with it all his wife's choses in action which had not been converted into possession.[11] But if the assignee failed to reduce any of the choses in action to possession before the death of the husband then such choses in action reverted to the wife, even though the husband had committed suicide.

Not the least important class of choses in action belonging to the wife are those arising from claims for compensation, for injuries done to her person or reputation. If a wife were beaten or assaulted by anyone except her husband the husband and wife joined in action against the wrong doer to recover damages for the injury so committed, the sum recovered going of course to the husband. The same thing was true of injuries received by the wife through the negligence of other parties as in a railroad accident.[12] The same thing was also true of defamation of the wife by anyone except the husband. In all these cases the husband collected the damage awarded for the injury by the court, even though he at the same time was entitled to bring an action for the injury done to him personally on account of the loss of the society of his wife because of the injury committed by the wrong doer.

(7) Kent Com., Vol. II, 135.
(8) Price vs. Price, 11 Ch. Div., 163 (1879).
(9) Kent Com., Vol. II, 135, Betts vs. Kimpton, 2 B. & Ad., 273 (1831).
(10) Kent Com., Vol. II, 137.
(11) Kent Com., Vol. II, 137.
(12) 2 Monroe (Ky.) 56, L. R. 7, Q. B. 112 (1871).

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But a still greater hardship to the wife was the fact that if her husband was found guilty of treason all of his lands were forfeited to the crown for the period of their joint lives and all of the husband's personal property, which as we have seen including the wife's personal property was also forfeited to the crown. And when we recall what great numbers of men were attainted of treason during the Wars of the Roses we can readily realize what great hardships must have befallen many of the best families of England. But forfeiture of lands and goods was not confined to treason alone but to all felonies, (*i. e.*, crimes punishable by death) were punished in the same manner. Murder, robbery, larceny, arson, counterfeiting, in fact, all felonies were punished in part by forfeiture of goods. And even accidental killing was punished in the same manner.[13]

From the foregoing view of the law we can see how dependent the fortune of the wife was upon that of her husband.

(To be continued.)

Lecture Notes—Mortgages.

PROF. A. A. STEARNS.

The debt is the principal thing in a mortgage contract. The mortgage security is a mere collateral arrangement, and is dependent upon the continued existence of the debt. It follows, therefore, that a transfer of the debt must carry with it the right to enforce the security, even though the latter is not in terms transferred.

The right of the assignee of a debt to enforce the security is the same as if the mortgage had, in fact, been assigned to him, and such a holder of a debt is called an equitable assignee of the mortgage, to distinguish him from the one who takes the mortgage by a regular and formal assignment.

The rights of the equitable assignee of a mortgage are in some confusion in Ohio, because of the somewhat conflicting decisions of our Supreme Court.

In the case of Swartz vs. Leist, 13 O. S., 419, the mortgagee transferred the note secured by the mortgage without making any transfer of the mortgage itself. Subsequently, and before the maturity of the note, the mortgagee fraudulently entered upon the records a cancellation of the mortgage, and the mortgagor thereafter conveyed the land to an innocent third person. The issue of this case was the priority between the purchaser and the equitable assignee of the mortgage.

The court holds that the party claiming under the mortgage as equitable assignee was negligent in not taking an assignment of the mortgage itself, so as to enable him, as the statute then read, to have

(13) Hale P. C. 1, 492.

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the assignment recorded, thus giving notice of his rights, and that the purchaser should have his title free from this encumbrance.

It was claimed by the equitable mortgagee that since the record disclosed that the mortgage debt was not due at the time of the apparent cancellation, the presumption of payment depending upon the record of the cancellation was unwarranted.

Holliger vs. Bates, 43 O. S., 437, presents the same question. In this case the mortgagee assigned the note without assigning the mortgage, thus making the holder the equitable assignee of the mortgage. He failed to record his assignment. A prior mortgagee began suit in foreclosure, and having no knowledge of the assignment of the junior lien, did not make the assignee a party, but made the original junior mortgagee a party, the latter having no further interest in the mortgage, made no answer, and a decree of foreclosure was entered by default, the land sold, and the senior mortgagee became the purchaser. He afterwards brought this action against the equitable mortgagee to quiet the title. These proceedings were had before the maturity of the assigned note.

In a former case before the court in negligence of the equitable mortgagee in not recording his assignment was made the basis of the holding against him. The same point was urged in this case in favor of the senior mortgagee. In both cases it was urged that the fact that the assigned note was not yet matured should have put the party seeking priority upon his guard.

In the second case, however, the court holds that the failure to record the assignment was not negligence, and the fact that the note had not matured was notice of the fact that the mortgage might yet be in force, the holding upon these points being different in the two cases.

No reference is made in the latter decision to the case of Swartz vs. Leist, although cited and commented upon in the briefs, the court evidently believing either that the distinction was too self-evident to require attention, or that the holdings were too inconsistent to admit of explanation.

In both cases the rights of the bona fide purchaser for value were involved, one purchaser dealing directly with the mortgagor, the other purchasing at the foreclosure sale. The one relied upon the public record of land titles; the other upon the record of the foreclosure suit, which records disclosed the same thing, namely, that if there were any equities against the land, they were *latent* or *secret* equities. The equity in each case arose from the equitable assignment of the mortgage. It was made *latent* in each case by the failure to cause a record to be made of the assignment.

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The rule in Ohio appears, therefore, to be as follows:

a. The transferee of the debt secured by mortgage is an equitable mortgagee, and may enforce the security without a formal assignment of the mortgage.

b. If the assignee of a mortgage fails to have the assignment recorded, and the original mortgagee fraudulently enters upon record a cancellation of the mortgage, a subsequent purchaser, even before the maturity of the mortgage debt, who had no actual notice of the assignment, will obtain title *free* from the encumbrance.

c. A purchaser under the foreclosure of a senior mortgage, who has no knowledge of the unrecorded assignment of a junior mortgage, such foreclosure being had before the maturity of the junior mortgage debt, will take his title *subject* to the junior mortgage, even though all the lien holders of record are made parties and fail to answer.

The Prevalence of Perjury.

In his annual address before the New York State Bar Association, President Edward G. Whitaker makes use of some very plain language in respect of the prevalence of the crime of perjury. His statements have been the subject of much comment on the part of the secular press of the country, and in some instances have been seriously questioned. It is greatly to be feared, however, that he does not exaggerate the evil, but gives a candid statement of the situation as it really exists. The address is worthy of the most careful consideration; and the evil it uncovers calls for the application of radical measures for its suppression. That the responsibility for its existence rests in part with members of the legal profession, few will deny. The loose manner in which pleadings and affidavits are drawn and sworn to is a matter of common knowledge. And so, also, does the responsibility for the suppression of the evil rest largely with the profession. We give below the extract from Mr. Whitaker's address in which the evil, the cause and its remedy are suggested:

In closing, I desire to say a few words upon what I consider the greatest existing evil in the administration of justice—the prevalency of the crime of perjury in legal proceedings—and to make one or two suggestions towards a partial remedy. The profession, I believe, generally concedes that perjury is at the present time the most prevalent and dangerous crime—and the most seldom punished. It has come to such a pass that men, standing high in the community, apparently think nothing of swearing falsely to pleadings, in order to delay and defeat justice. Most of this false swearing to pleadings is made safe and possible by the use of that great perjury-begetting provision of

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our Code, which allows allegations upon information and belief, and denials upon want of information or belief. But, in addition to swearing falsely to affidavits and pleadings, many men have no regard at all for the sanctity of an oath administered in a court of justice. To such men the actual defeat of justice, if it be to their pecuniary benefit, is viewed with complacency, even though effected by perjury.

I think it is the observation of judges and of practicing lawyers that the crime of perjury is committed in some form or other in at least five out of every ten litigated cases. After talking to many lawyers and judges upon the subject, this is the lowest estimate I have received. When we consider the thousands of litigated causes that are tried in our state each year, it is simply appalling. It is an awful, but I believe a true confession. It is a shame on the administration of justice and a disgrace to our nineteen centuries of Christian civilization. Were David now alive, he might again exclaim: "All men are liars!"

The cause of the increase and prevalency of perjury is not hard to find. It arises largely from a weakening in the belief of future punishment, and an apparent certainty of freedom from present punishment.

The chief test of the obligation of an oath is based upon a belief in future punishment, as is evidenced by the form of the oath, and manner of its administration, as recognized by law. If, therefore, we eliminate all idea of future punishment for perjury, and inflict no present punishment, or, in other words, abolish all punishment, both here and hereafter, it is not to be wondered at that the crime will prevail, and that men will not hesitate to commit it to further their interests. For punishment is the great deterrent to crime. From the year 1830 to 1896 there have only been on an average three convictions a year for perjury; and during the last two years only one conviction. The crime is increasing, and the punishment decreasing. Unless the commission of the crime of perjury be checked, the enforcement of rights, or prevention of wrongs through the administration of justice will become a farce.

Can the commission of perjury be checked, and how? Most emphatically *yes*, by the bench and bar; by the judges directing investigation to be made by the district attorney in all cases tried before them when they have reason to believe perjury has been committed and can be proved, and by members of the bar simply being honest and true to their profession. If the lawyers of this State would positively discourage false swearing on the part of their own clients, and honestly endeavor to have it punished when committed by the clients of their adversary, the crime would grow suddenly less. It is the professional duty of every lawyer to do this. He owes it to himself; he owes it to his fellow-man; he owes it to his country, and he owes it to his God.

In populous counties there should be a department in the office of every district attorney devoted entirely to the prosecution of the crime of perjury, where lawyers, who desire to do their duty, could take such cases.—The Washington Law Reporter.

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Address all literary communications to the Editor-in-Chief; all business communications to the Business Manager.

Editorial

It is with deep regret that we announce the death of Carrie Butler Thwing, wife of our esteemed President. This will come as a shock to many, who, by reason of their high regard and warm personal feeling for Dr. Thwing, share alike this common sorrow, in the hour of darkest adversity.

The retirement of John Sherman to private life removes from the stage of public action one of the most notable figures in American history. Like Webster and Clay, he failed to pluck the rarest prize when almost within his grasp. But the Presidency would have added little to the name of Sherman. Webster will be known long after the names of presidents have been effaced and their memory forgotten. John Sherman had his enemies. His own party associates called him cold, heartless and greedy. He has been accused of trickery and collusive intrigue in order to enrich himself. While perhaps at times justly censured, he has been unjustly slandered, maligned, lied about; but he has survived it all. Today there is something inspiring in the passing of this grand old man—burdened with the weight of years.

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grown gray in the service of his country, a life devoted to toil in a nation's service, now entering for the few remaining years the peaceful and quiet ranks of private life. It is the setting of a sun as serenely as the dawn. Whatever mark the sting and lash of censure may have made in the heat and turmoil of the past, a nation's reverence now pays solemn tribute to the name of Sherman—first the warrior and lastly the statesman—brothers, leaders in war and peace, whose mighty genius came to mould and guide the history and future of a race, who gave their energies and their lives to the glory and honor of a land they loved.

With this number the JOURNAL Board undergoes its annual change. Mr. Crawford retires from the chief-editorship, which position he has filled for the past year. Mr. Friebolin will be a worthy successor. Mr. Ewing enters upon the managership duties laid down by Mr. Shaw. The other members elected are: Mr. Bole, Mr. Stuart and Mr. Cobb.

To those outgoing members of the Board, now so intensely absorbed in the final test so soon to come, we extend a reluctant farewell. Our relations together have been pleasant and profitable. The new Board will enter upon the work of the coming year with added strength and hope, endeavoring at all times to maintain and advance the high standard of conservatism which has characterized the JOURNAL in the past.

Coincident with the passing of Sherman is the coming of Day, whose acceptance of the premier portfolio gives cause for much congratulation on the part of the Ohio legal fraternity. It is a singular coincidence that our two greatest national positions are filled by fellow townsmen. Yet here in Ohio—the envied leader of states and maker of men—those who know Judge Day best speak highest of his worth. The exactions of a time and crisis like the present are necessarily very portentious; but with two of Ohio's best at the helm we need entertain no fears for the outcome. The President's long acquaintance with Mr. Day, coupled with a thorough conviction of that gentleman's ability to deal with all questions of state, combined to render an appointment eminently fitting and proper.

The opportunity for making history seems to be at hand. We had hoped to live in continued peace with all the world but now that the spell is broken we shall not weep. Nevertheless many, no doubt, justly

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believe this irrepressible conflict could and should have been repressed. It would be unwise to question the patriotism of those who sought for peace. Reluctance to fight is not always cowardice. Those who rush in at the first call are not always the bravest. In '61 the boys who were swept with eager ardor into the first call found an antidote at Bull Run. It requires more nerve to accept the second invitation. Not all the patriotism is sleeping under tents tonight. These thoughts we give to those who are not needed at present. Gladly our hopes go with our boys who leave, and the vacant seats in the classroom speak volumes to us now. How soon their call for aid may come we cannot tell. Yet one thing is certain—this is a time when the real in man crops out. To be ready when the call comes, willing to go to the front, fight to the finish and then return to toil again, this is all the country asks. Yet this much it will expect. To compromise is to show the white feather. "He who hesitates is lost and he who doubts is damned." Another thing, this is a poor time for political agitation. Party lines should vanish. He who allows partisanship to move his lips from now on until Spanish rule is forever wiped from the face of our Western World, is a traitor of the vilest type. To those who have come upon the world since the war the coming months will be full of interest.

R. B. N.

A decision embodying a judicial definition of the word "accident" was handed down on the 14th inst., by the United States Court of Appeals, at St. Louis, Mo., being an affirmance of the lower court wherein Mrs. Sarah I. Smith obtained a judgment against the Western Commercial Travelers' Association for $5000 on the death of her husband. Freeman O. Smith, of St. Louis, died from blood poisoning in 1895, as a result of a sore toe, the skin of which had been abraded by a tight shoe. Mrs. Smith attempted to collect the accident policy but was resisted by the company on the ground that death was not caused by an accident. A jury in Judge Adams' court gave Mrs. Smith the full amount of the policy, and the association appealed. Judge Sanborn held that the death of the insured had been brought about by an external agency and that it was accidental. The court said: "What is not the result of design or prearrangement is accidental. No man intentionally wears the skin off his toes, and such injury must be considered accidental"—which would seem to be good common sense as well as very good law.

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Supreme Court of Ohio Law Examination.

(CONTINUED.)

MARCH 8, 1898.

CONTRACTS.

31. Are the executory contracts of an infant *void* unless *ratified* by him within a reasonable time after becoming of age, or *valid* unless *disaffirmed* by him within such time?

32. What is the present law of Ohio as to the power of a married woman to contract? Let your answer be full and explicit.

33. The defendant executed to the plaintiff a non-negotiable promissory note as a renewal of a matured bill of exchange previously drawn by a third party and purporting to be endorsed to plaintiff by the defendant. The plaintiff, upon the execution of the note, delivered up to the defendant the bill of exchange thus renewed. Thirty days afterwards it was discovered, for the first time, that the defendant had not, in fact, endorsed the bill of exchange. Was there a sufficient consideration to support the note? Give reasons for your answer.

34. A non-negotiable note was given in settlement of an account otherwise valid but which was (as both parties knew) barred by the statute of limitations. Is there sufficient consideration to support the note?

35. State the difference between *total* and *partial* failure of the consideration of a contract in the effect upon the defendant's rights when sued upon the contract.

36. What agreements not to carry on or exercise a trade or business are valid contracts?

37. A domestic servant entered into an agreement with his master whereby the master agreed to retain the servant for a fixed term of years, and the servant agreed to serve the master for such time. Before the expiration of the term fixed by the agreement the master died. The full amount of wages up to the time of the master's death being paid, what liability exists, further, against the master's estate?

If the servant had died before the expiration of the term, leaving the master still alive, what would be the liability of the servant's estate on the contract?

38. Where negotiations looking to the formation of a contract are carried on by mail between the parties,

(a) When is the communication of the proposal complete as against the proposer?

(b) When is the communication of the acceptance complete as against the acceptor?

(c) When is the communication of the acceptance complete as against the proposer?

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39. Within what time, under the Ohio statute of limitations, must an action be brought

(a) On a contract in writing?

(b) On a verbal contract?

(c) On a contract implied by law?

PUBLIC AND PRIVATE CORPORATIONS.

(Give reasons in all cases).

40. The city of Cleveland appropriates a part of certain lands belonging to John Doe for street purposes. In a proceeding to assess compensation and damages, what is the rule of law in determining each?

41. A mob of citizens of Columbus destroy the property of an unpopular citizen. The police and municipal authorities stand idly by and make no attempt to prevent the destruction of the property. The owner sues the city for damages. What are his rights?

42. What is the liability of a stockholder on his subscription and stock liability in an Ohio corporation de facto after judgment of ouster from its corporate existence?

43. What is the statute of limitations applicable to stockholder's individual liability and when does it begin to run?

44. When, if at all, in Ohio, may a corporation be subjected to exemplary or punitive damages for tortious acts of its agents or servants, done within the scope of their employment?

45. A verbally agrees to take twenty shares of stock in a company just organizing, and gives his promissory note to pay for them, due in one year. The note is not paid at maturity, and no certificates of stock has as yet been issued to A. What are the right of the company on the note?

BAILMENT.

46. Can a common carrier limit his common law liability? If so, how and to what extent?

47. A hired a horse from B and while having possession of it under his contract, left it with a liveryman to be fed and cared for. A refused to pay for the feed and care; has the liveryman a lien on the horse for his bill? Give reason for answer.

48. What was the common law responsibility of an innkeeper for the goods of his guest, deposited in his inn?

49. Y received from N a bill of exchange, which he agreed to collect gratuitously. He remitted it to a bank without disclosing the bailment. The bank collected it and put the amount to Y's credit, but failed before Y drew the money. Is the bailee responsible to the bailor for the amount so collected? Give reason for answer.

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50. (a) What is a pledge?

(b) Where the pledge is for a debt and the pledgee remains in possession of the pledge, has the pledgor a right to redeem after the debt is past due? If so, when does his right to redeem cease, or, in other words, when does the statute of limitations begin to run?

TORTS.

51. (a) What do you understand by tort?

(b) What do you understand by contributory negligence?

(c) In the State of Ohio what is the rule in regard to contributory negligence by the plaintiff?

52. Into how many different classes may torts properly be divided? What are they and give examples of each?

53. In what three ways may one become liable to an action for tort?

54. B, C and D unite in committing a battery on A. A sues and recovers damages from B. Can B recover a proportionate share of what he has paid from C and D? Why?

55. Will length of time legalize a public nuisance? Why?

CRIMINAL LAW.

56. May an accessory be convicted of a higher degree of crime than that for which the principal was convicted?

57. (a) Define burglary and larceny.

(b) Can burglary and larceny both be charged in the same count?

58. (a) Is an indictment by grand jury required in prosecutions for crimes, offenses and misdemeanors of which the probate court has cognizance?

(b) When shall prosecution be by information?

(c) May information be amended? If so, when and how?

59. What is the difference between felonies and misdemeanors?

60. (a) In what time must an indictment be found in offenses, the prosecution of which is not specially limited by law? What class of cases is excepted from the limitation?

(b) Define perjury.

61. (a) What do you understand by aiders and abettors?

(b) In what degree are they responsible?

LEGAL ETHICS.

62. You have a case against a party who is represented by an attorney in good standing and reputation. You have vainly tried to

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settle the case with the attorney, but learn that you can make advantageous settlement by dealing directly with the defendant. Under what circumstances would you be justified in so doing?

63. What limitations are, by due regard for legal ethics, placed upon the conduct of counsel representing the defense of a person charged with crime of which the counsel believes his client guilty and of which, in fact, he is guilty?

64. You have been retained to defend a civil action. Your client has stated to you, as facts, circumstances which, if proved, will, in law, constitute a complete defense in the action. While the trial of the case is in progress circumstances appear which convince you, to a moral certainty, that your client has lied to you and that, in justice, the verdict ought to be for the plaintiff; what is your duty in the premises, and what course of action ought you to pursue?

SURETYSHIP.

65. By what means, outside of the payment of the debt in full by the principal, may a person, originally bound as surety, be released, in whole or in part, from liability?

66. A person liable as surety on a past due obligation, whose principal is in failing circumstances, wishes to protect himself as far as possible. What different courses are open to him?

67. Can a creditor avail himself of security held by surety? Can surety avail himself of security held by creditor? Is co-surety entitled to share benefit of security given co-surety by principal?

68. What is the difference, if any, between contract of guaranty and of suretyship.

69. A client advises you that he has been sued on a note upon which he is surety; that his principal is a co-defendant and is responsible. What course would you pursue in behalf of such client?

EVIDENCE.

70. (a) A husband informs his wife that he has burned his neighbor's barn and is guilty of arson. Afterwards the State, in a criminal prosecution against the husband for the offense, calls the wife as a witness to testify to that admission. Can her testimony be used? Why?

(b) A patient informs his physician that he had been intoxicated and on a debauch for several days, and desires treatment. Can the physician be compelled to testify to this communication? Why?

71. (a) In what cases generally are affidavits competent as evidence?

(b) What is the difference between an affidavit and a deposition?

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72. It is desired to impeach A, a witness, by the testimony of B. What question or questions would you ask B for this purpose?

73. The question is as to B's age. B himself offers to testify as to his own age and also offers the family Bible containing the family record. All objected to. What is your ruling and why?

74. Describe what is meant by a "dying declaration," such as would be competent as evidence.

EQUITY.

75. (a) What is the equitable remedy by means of which a lost writing may be supplied?

(b) What is the equitable remedy for the correction of an instrument erroneously framed?

76. A married woman encourages A to buy property of B, knowing that the title was not in B, but in herself. Can she assert her title against A's? Give reasons for your answer.

77. A having a good title to a farm enters into a parol contract with B, wherein A agrees that within nine months from the time of making the contract he will convey the land to B. B pays the purchase price, and with A's consent takes possession of the farm, builds a house and outbuildings and plants an orchard. A refuses to convey. B wants the farm. Would you advise him to bring an action, and if so, action for what?

78. (a) Has the Common Pleas Court equitable jurisdiction in Ohio?

(b) Has the justice of the peace equitable jurisdiction in Ohio?

79. A, the owner of land worth $1,000, mortgages it to B for $1,000. The only value of the land is in the timber growing thereon. The mortgagor remains in possession and begins to cut and sell the timber. What would you advise B?

80. A sells his farm to B, delivering deed and possession. A accepts a mortgage on another tract of land owned by B, to secure the payment of the purchase money. Has A a vendor's lien to secure the purchase money? Give reason for your answer.

DOMESTIC RELATIONS.

81. What are the legal obligations of parents towards their children?

82. A, who lacks three days of his majority, enters into a contract with B, a dealer in hardware, for a gun to be delivered in ten days.

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The gun is immediately ordered by B, but when it comes ten days after it is ordered B refuses to deliver it to A.

(a) A sues for breach of the contract. Can he recover? Why?

(b) When the gun comes B offers to deliver it to A, who refuses to accept it. B sues. Can he recover? Why?

83. Give three of the causes for which alimony may be allowed in Ohio.

84. A is the guardian of the person and estate of B, an infant female. B marries. What effect does the marriage have on the guardianship?

85. A son lives at home with his father as a member of the family until he is twenty-two years old. The son worked on the farm, as other members of the family did, from the time he was eighteen. There was no express contract that the father should pay for the services rendered, and no expectation or intention on the part of the father to pay or the son to receive pay for the services. The son sues. Is the father liable? If so, for what time?

PLEADINGS.

86. Plaintiffs brought suit as partners and upon the trial of the cause, the proof showed a debt due them severally and not as a partnership. Can the defect be cured by amendment, and why?

87. Draw such a pleading as you would file in court as attorney for the defendant in an action begun by petition in due form, filed at the January term, 1898, of the Court of Common Pleas of Franklin County, Ohio, upon a promissory note dated January 1, 1880, for $1,000, with interest at 6 per cent. per annum, due in one year from date, upon which no indorsement had been made, and the plaintiff asked judgment for $1,000, with interest from date.

88. With what certainty must real estate be described in a pleading, and should pleadings be liberally or strictly constructed?

89. Give the rule days for pleading in Ohio.

90. Is it necessary to state in a pleading facts of which judicial notice will be taken? Name three facts which will be judicially noticed.

PERSONAL PROPERTY.

91. Give three methods by which liens may be acquired on personal property.

92. Give three of the most common instances in which there is an implied warranty of quality on the sale of chattels.

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93. A, a resident of Ohio, dies intestate, leaving both real and personal property, a part of each kind being located in Ohio, and the other part in the state of Colorado. By the laws of Colorado the course of descent and distribution is different from that of Ohio. What law would govern as to the descent of each kind of property in each state, and why?

94. A owns a stock of merchandise upon which B has a chattel mortgage for an amount greater than the value of the stock. B is solvent, but A is wholly insolvent. Wishing to make B's security good, A buys $1,000 worth of goods of C on 60 days' credit, concealing from him the fact that he is wholly insolvent, and does not expect to be able to, nor does he intend, to pay for them. The goods are delivered and added to A's stock, whereupon B, with full knowledge of all the above facts, immediately seizes the entire stock under his mortgage, takes it into his possession, and is about to sell it to satisfy his claim. At this stage C places his claim against A in your hands for collection, the 60 days' credit not having expired. What are C's rights and against whom, and what action, if any, would you bring, and against whom?

95. A, without authority, but through innocent mistake as to boundaries, enters upon the lands of B, cuts timber and works it up into cord wood, taking it off the land and into his own possession. What action would you bring for A, and what would be the measure of his damages? How would it have affected the case if A had been a willful trespasser?

PARTNERSHIP.

(Give reasons in all cases).

96. A and B are partners in the livery business, having ten horses and equipment to correspond. They quarrel, and A demands of B one-half of the stock, and B refuses, whereupon A brings replevin for one-half of the stock, etc., describing it definitely in the writ. What are A's rights?

97. B allows A to hold him out as a partner. X sells A a bill of goods, but does not know at the time that A is holding B out as a partner, or that B has anything to do with the concern. X afterwards learns that A has been holding out B as a partner. A is insolvent. Can X hold B?

98. X, a partner in X, Y & Co., a trading partnership, gives his individual note to the firm for $500.00. What are the rights of the firm against X on the note? Suppose the firm had endorsed the note to A. What are A's rights against X?

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99. A and B are partners and become bankrupt. There are no joint assets. A separate commission in bankruptcy is issued, also, against the separate estate of A. B is solvent. The joint creditors of A and B wish to prove their claims against the separate estate of A. Can they do so?

100. A is a partner in the A-B Co., a trading partnership, and in order to enable X to raise money, gives X a firm note, signing the note in the firm name. X sells the note to Y, who buys it before maturity. Can Y hold the firm?

Suppose A had signed the note individually, and had then signed the firm name, adding the word "surety," would this make any difference in your answer?

May a State Impeach its own Witnesses?

That a party cannot impeach the character of his own witness seems to be an established principle of the common law. A generally recognized exception to this rule, however, permits the impeachment of an attesting or subscribing witness to a deed or will. The Supreme Court of Vermont, in a recent case, State v. Slake, 38 Atl. Rep., 311, has extended this exception by holding that the state may impeach its own witnesses in criminal cases. Apparently there is no authority for such a proposition. It is believed, furthermore, to be untenable on principle.

The reason usually assigned by the courts for making an exception in the case of witnesses to an instrument is that, inasmuch as a party is compelled by law to call such witnesses, he does not therefore present them to the court as worthy of belief. Precisely the same ground underlies the decision in State v. Slake, supra. The court holds it to be "the duty of the state to produce and use all witnesses within reach of process, of whatever character, whose testimony will aid the jury in arriving at the truth, whether it makes for or against the accused, and that, therefore, the state is not to be prejudiced by the character of the witnesses it calls." In another place the court says that "the state is bound to call all the witnesses," not being "at liberty to choose and to call whomsoever it will."

If a literal construction of this language be adopted, the court certainly seems to regard it as obligatory upon the state to call every possible witness, including the defendant and the defendant's witnesses. Clearly, in many instances, such a rule could not possibly be put into practice. Even where practicable, it would often result in a needless waste of time and money. Conceivably the court merely means that the number of witnesses in a given case being necessarily limited to

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such as happen to be cognizant of the facts the state is consequently obliged to call such persons, and should, therefore, be entitled to impeach their character. This reasoning, however, would operate equally well in favor of the prisoner and both parties to a civil suit; and were such a doctrine thus extended by the courts, the general principle that a party cannot impeach his own witness would have no significance whatever.

In granting to the state this privilege of impeaching its own witnesses, of any constitutional restriction, it would seem clear that the Fourteenth Amendment makes it impossible to hold valid any administration of the estate of a living man. A probate court, which is essentially a court of very limited jurisdiction, acting without a jury, has never been legally empowered to meddle with the goods of any living person, nor can it do so by any "due process of law."—Harvard Law Review.

Admission to the Bar on Diploma from a Law School.

One of the subjects discussed in the section on Legal Education at the late meeting of the American Bar Association was whether a diploma from the incorporated law schools of the state should entitle the holder to admission to the bar, without further examination. The view that seemed to prevail was that the diploma should carry no such privilege. For this several reasons were assigned, in most of which we heartily concur. One was that the standard for admission should be uniform, and every applicant should undergo the same test. Another was that if the legislature, satisfied of the efficiency of the existing law schools, should declare their diplomas a sufficient passport to the bar, every subsequent law school established in the state, whether good, bad or indifferent, would demand the same privilege for its diplomas; and, what is more to the point, would get it. Another objection urged was that the rule had worked badly in practice, on account of the low standard existing in many of the law schools, whose ambition to graduate as large a number as possible, in order to attract students, and make a show of prosperity, tended to a declining standard.

The suggestion has been more than once made that as the law school of the University of Virginia is a state institution, the state should dignify its own, and further its own interests, by making the diploma from that law school a sufficient evidence of qualification for the bar. While we have no authority to speak for the law school, we believe it has no desire for any such distinction, and would even prefer that its graduates should undergo before the Court of Appeals the same test demanded of other applicants for admission to the bar.

Knowledge by the instructors of a law school that those to whom

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they award diplomas are to be taken in hand, and their own work subjected to the scrutiny of another set of examiners, bent on detecting incompetency and exposing it wherever found, is the best possible incentive to the maintenance of a high standard in the law schools.—Virginia Law Register.

Webster Outdone.

Of course, Webster was in demand by those who could afford to pay for his services, says the Boston Herald. A sharp Nantucket man is said to have got the better of the great defender of the constitution in an amusing way, however. He had a small case which was to be tried at Nantucket one week in June, and he posted to Webster's office in great haste. It was a contest with a neighbor over a matter of considerable local interest, and his pride as a litigant was at stake. He told Webster the particulars, and asked what he would charge to conduct the case. "Why," said Webster, "you can't afford to hire me. I should have to stay down there the whole week, and my fee would be more than the whole case is worth. I couldn't go down there for less than $1,000. I could try every case on the docket as well as one, and it wouldn't cost any more, for one case would take my time for the entire week, anyway." "All right, Mr. Webster," quickly responded the Nantucketer. "Here's your $1,000. You come down, and I'll fix it so you can try every case." Webster was so amused over this proposition that he kept his word. He spent the entire week in Nantucket, and appeared on one side or the other in very case that came up for hearing. The shrewd Nantucketer hired Daniel out to all his friends who were in litigation, and received in return about $1,500, so that he got Webster's services for nothing and made a good profit to boot. If that man were alive in these days of trusts and syndicates, he would probably be at the head of a legal trust controlling the services of all the big lawyers of the country.

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Recent Cases.

BANKS — STOCKHOLDERS MUST ASSESS STOCK. —The directors of a national bank have not the authority by power to manage the general business to levy an assessment on notice from the comptroller that the capital is so impaired that an assessment must be made but this power rests exclusively in the stockholders.

Also as the statute gives a remedy for failure to pay an assessment by subjecting stock, the stockholder cannot be held personally liable. Hulitt vs. Bell, 85 Fed. Rep., 98 (C. C.)

CIVIL SERVICE RULES.—Are but expressions of the will of the executive and a court of equity will not by injunction restrain an executive officer from making a wrongful removal of a subordinate appointee nor restrain the appointment of another. Disapproving Priddie vs. Thompson, 82 Fed., 186. Morgan vs. Nunn, 84 Fed. Rep., 551 (C. C.)

CRIMINAL LAW — EVIDENCE OF BLOODHOUNDS.—Testimony as to trailing by a bloodhound is admissible where it is established by the evidence of some person having knowledge that the dog has acuteness of scent or has been trained in tracking human beings, and it is shown that such dog has been placed on the trail where circumstances show the guilty party has been. Pedigo vs. Commonwealth, 44 S. W., 143 (Ky.)

This case would seem to establish a new exception to the hearsay rule of evidence; permitting a person to testify as to what another, the dog, tells him The courts of Alabama also admit such testimony but it would seem that the dissenting opinion of Guffy, J., in the above case is right on principle. The courts of the U. S. in this enlightened age should not suffer a man to be convicted by the testimony of bloodhounds.

DAMAGES—EXAMINATION OF PERSON OF PLAINTIFF.—Plaintiff sued for injuries to his person. On motion of defendant, plaintiff was compelled to submit to a surgical examination of his person by experts, if the examination could be made without danger to the plaintiff's life or health and without the infliction of serious pain. Electric Line Co. v. Allen 44 S. W. (Ky), 89.

This decision is in accord with the decision of Turnpike Co. v. Baily, 37 O. S., 104, and that of some other states, although expressly repudiated by Indiana and others. In the Ohio case, White, J., without any argument or citations lays it down : "In an action for injuries caused by the negligence of the defendant the court has power to require the plaintiff to submit his person to an examination by physicians and surgeons, when necessary to ascertain the nature and extent of the injury."

DEFRAUDING BY FALSE PRETENSES — VIOLATION OF U. S. STATUTE.—Prosecutor was led by a scheme proposed by defendant to pay $50 for which he was to receive the use of an alleged superhuman power to discover a treasure hidden in his field. Defendant was arraigned for violation of U. S. Rev. Stat., §5480, against schemes to defraud by use of the mails. The court hold that defendant was not guilty of violation of the statute, that not amounting to a "scheme to defraud" because not "reasonably calculated to deceive persons of ordinary prudence." United States vs. Fay, 83 Fed Rep., 839.

We are unable to see how the court could in the light of the decision in United States vs. Reed, 42 Fed. Rep., 134, come to such a decision. It will

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not answer to say that we have no law for fools. It is for those persons who have not ordinary prudence that the statute is really needed, as Wright, J., in Bartlett vs. State, 25 O. S., 670, aptly says: "Even persons deprived of ordinary discretion, children or idiots are entitled to the protection of the law and a man who is ineffably dull may not for that reason alone be robbed with immunity."

It is often boastfully asserted that the law's chief aim is to cast a special protection around the weak and feeble, and that such should be its aim seems eminently sensible. For this reason it would seem that the court should in this case have decided the other way.

INSOLVENCY — NATIONAL BANK.—A bank is not insolvent unless it is unable to pay current obligations as they mature, and a payment made in regular course of business is not void by Rev. Stat., §5242, as made in contemplation of insolvency although the directors knew that the bank must inevitably become insolvent within a very short time. Hayden vs. Chemical Nat. Bank, 84 Fed. Rep., 874 (C. C. A.)

OPINION—FED. JUDGE MAY EXPRESS.—Held that a federal judge might express his opinion as to what facts were to be deduced from the evidence if at the same time he informed the jury that they were the judges of the facts. Hart vs. U. S., 84 Fed. Rep., 799 (C. C. A.)

RES JUDICATA—ADDITIONAL FACTS—After a judgment on the merits of the case the entire transaction is res judicata and cannot be again brought up although additional facts of negligence have been discovered and it is the object of the plaintiff to introduce them. Columb vs. Webster Mfg. Co., 84 Fed. Rep., 592 (C. C. A.)

Book Reviews.

THE SCIENCE OF LAW AND LAW-MAKING—Being a treatise on the truths of law and jurisprudence, and a discussion of the question of codification. By R. Floyd Clarke, A. B., LL. B., of the New York Bar, New York. The Macmillan Co., 66 Fifth Ave., N. Y. 1898. Price, pp. xii-485, $4.00.

The interrelation existing between the student of law and the maker of law probably explains most fully the reason why all branches of government—executive, legislative and judicial—are represented and controlled in the majority of cases by members of the legal profession. Those from whom the law comes should best know the law; likewise those who judge and enforce it. The work at hand is designed to enlighten the layman upon the nature, the peculiarities and methods of law and law making, to give him capacity where he most needs it. It is remarkable that such a mission has gone so long unfulfilled. Here is a work, written with scholarly accuracy and clearness, so simple as to render a dictionary unnecessary, and yet so complete and profound as to invade the depths of a science on which many of our law-givers are painfully ignorant. Mr. Clarke has sought to present to the repre-

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sentative mind a better familiarity with legal problems, to the end that all those who may come to apply legal principles to actual legislation may do so in the full sunlight of a superior intelligence, unhampered by the colossal ignorance so prevalent among our modern Solons, which ignorance is manifest by statute books groaning under the weight of countless laws which are not now nor have ever been enforced. Yet in spite of all this the remedy, says Mr. Clarke, lies in legislative action —not in the courts. The nobler purpose is to elevate the standard and intelligence of the law making power. This the work of the author is designed in part to accomplish.

With the keen analysis of a legal mind he has evolved an argument upon the question of codification entering exhaustively and impartially into the different phases of Statute and Case Law and eventually determining the superiority of the latter over the former as the mainspring in effecting the fullest development of the law. "For it must be remembered," says the author, "that law is a concrete science and not an abstract science, that it deals with concrete things and not with abstractions. Herein, then, lies the superiority of the Case Law over the Code: The Common Law deals with the concrete case, and from one of more concrete cases reasons to another concrete case; while the Code deals with an abstraction and reasons from the abstraction to the concrete case. And, when the abstraction does not cover or incorrectly decides the concrete case the code is wholly at fault. There is no health left in it, no principle to guide it" "Codification would be the forging of fetters on the Science of Law, precluding its true development." "Codification presupposing infinite knowledge is a dream." We must admit, living as we do under the Code jurisdiction, that there is much truth in the foregoing argument.

The Code is not the "ne plus ultra." "The strictest law is often the greatest injustice."

To those who, with a mental aggressiveness, are continually alive to the absorption of useful and valuable, even necessary knowledge, we gladly commend this work as a new contribution to the field of scientific legal thought. R. B. N.

JOURNAL ENTRIES —Adapted to the practice in the Common Pleas, Circuit and Probate Courts of Ohio and other states having Codes of Practice and Laws similar to Ohio. By Louis H. Winch and M. S. Hinman. The Robert Clarke Co., Cincinnati. 1898. pp xi-597.

This book contains few surprises to members of the Cleveland bar who have been familiar with Mr. Hinman's work as a journal clerk during the last twenty years. Long ago they ascertained that it availed

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nothing with him to advance the antiquity of a "form" as a reason for its use, if that was the only or principal argument in its favor; that although a precedent long and well-established if it continued to embody a living principle had his undying respect, yet he had no room in his collection for mere fossils. Early in that acquaintance they also discovered, from the trail of his blue pencil over many a carefully prepared decree, that he was a stanch advocate of simplicity and an inveterate foe of redundancy; that clearness was "sweetness and light" to him, and obscurity an abomination. Still another prominent characteristic, which they noticed increased with the passing years, was an almost total abstinence of dogmatism, not due to absence of definite views or to any uncertainty in his opinions, but born rather of innate modesty and consideration for the conclusions of others. The most superficial examination of this book reveals all of these characteristics of the man and to those who know him in his work, it would have been a disappointment had it failed to do so.

The Ohio practitioner naturally compares this work with that of Mr. E. N. Wild published twenty-two years ago, as the fields of both, in the main, coincide, although Mr. Wilds did not attempt to cover the field of Probate practice in his work. The substitution of the Circuit Court for the District Court, and many material changes in the law of procedure made since that time (e. g. the change in the replevin law) almost demanded a new work in this field. That the present work should contain more forms than that of Mr. Wild is only natural. He whose daily work requires him frequently to consult a book of precedents very often finds himself in situations in which no work of that sort furnishes him with a "ready-made" form. He is therefore obliged to evolve one and when he has worked out the problem and has produced something which satisfies him and stands the test of use he naturally believes it ought to be preserved, and is anxious to bless mankind with his product. Then, too, years of experience give one a more comprehensive view of the territory and impress upon one many of its features which, at an earlier time, appeared to be inconsequential.

It is not our purpose to institute a comparison between the quality of this work and that of Mr. Wild's. In many instances the forms are practically identical. In some, there are differences of a minor nature, while in very few are there such differences as would indicate a serious disagreement between the writers. We feel it but just to say that of the quality of the present work, especially that part relating to civil practice in the Common Pleas and Circuit Courts, there can be but one opinion. It all bespeaks painstaking care. It has been wrought out, not in the school room or in the study, but in the court room, in the sight and hearing of contests for the mastery between great and valu-

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able interests, and after the contests have been decided the contending parties have enforced their legal demand that the result shall be accurately recorded. The bar can confidently rely on these forms because they are well assured that they have been tested and are the survivors of actual warfare.

While the book contains many valuable suggestions on the general subject of Journal Entries, its authors will hardly claim for it the dignity of a treatise on that subject. The references to decisions are, in the main, accurate, and are of considerable aid in examining the subjects under discussion. These citations might have been more copious without detriment to the work, and a table of cases might have added to its usefulness. Its absence, however, is not necessarily a blemish on the work. A. H.

A Library in Itself.

Few people are able to buy as many books as they would like, yet it is possible without them to keep in touch with all the leaders of literature, as well as to follow the world's progress in every department of science and industry. "The Youth's Companion" already provides the means for more than half a million households—at an expense to each of $1.75 a year. Every issue of "The Companion" gives as much reading matter as a 12mo book of 175 pages, and "The Companion" comes every week. The quality of its contents is shown by the announcement for 1898, which promises contributions next year from the Rt. Hon. W. E. Gladstone, Rudyard Kipling, Speaker Reed, Capt. A. T. Mahan, Mary E. Wilkins, W. D. Howells, Lieutenant Peary, the Marquis of Dufferin, Senator Hoar, Justin McCarthy and more than two hundred other eminent men and women.

All new subscribers for 1898 will receive "The Companion's" gold-embossed calendar, beautifully printed in twelve colors, and the paper will also be sent free from the time the subscription is received until January, 1898, and then for a full year to January, 1899. A handsome illustrated prospectus of the volume for 1898 will be sent to anyone addressing "The Youth's Companion," 205 Columbus Ave., Boston, Mass.

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THE

Western Reserve Law Journal

Vol. IV MAY-JUNE, 1898 No. 4

Medicine in its Relation to Law.

To the student of either law or medicine the question is self-suggestive: What was the origin of Medical Jurisprudence, and why was it so belated in history?

And that question ought to be answered before the detail of method and significance in its practice is begun.

The interrelation of theology, law and medicine is so complex in history that it is difficult, even if material, to assert which began first, or of what, if any, import was the disentangling and separate course of these three professions. The fact exists that from the beginning of history they were closely related. We are in the habit of dating each from the Mosaic Period. But thousands of years or even ages antedated that period. The excavations at Nippur in Babylonia discount all recorded history. By analogy and inference alone, we may theorize a beginning. By history and acquaintance with the necessities of community life we arrive at the conclusion that an incontrovertible requirement of self-preservation advanced law to a justifiable precedence in the affairs of life, which within historical times has prevailed and ever will prevail. But the modifying circumstances of that precedence have always and will ever creep out in entertaining and suggestive landmarks of our progress.

Forensic Medicine, as a separate study deduced from facts gathered out of medical experience and rendered useful in the exercise of jurisprudence, has been necessarily slow in growth and tardy of merited recognition. This is not surprising when the history of those gathered facts are properly scanned. Systematized knowledge sufficient to constitute a science could scarcely be claimed for medicine

Read before the First Year Class of Western Reserve Law School, Friday evening, Feb. 25, 1898.

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before the present century. Facts were offered which in reality were only theories, disputed in their time and discarded for others in derisive succession, because they lacked the necessary foundation to build upon. Anatomy, physiology and chemistry were in a crude state of guess-work; and philosophies based on these elementary essentials were often false in their premises and absurd in their conclusions. But let us not presume that the whole fault lay with the votaries of medicine. A stupid and obstinate public sentiment had for long centuries obstructed the practice of human anatomy, the chief corner stone of a rational structure of medicine. The more selfish and absorbing occupations of conquest and power; of battle, intrigue and discourse, did not wittingly tend to hasten the development of the experimental sciences.

It would be ungracious as well as lacking in verity to deny the merit of Galen's scholarly attainments and influence which held sway throughout the medical world for at least 1300 years. But it is humiliating to read that as late as 1559 Dr. Geynes "was cited before the college for impugning the infallibility of Galen." 'On his acknowledgment and humble recantation signed with his own hand he was received into the college" (Chambers). It was five years later that the famous Italian physician Galileo was born. And seventy years afterward, the Church felt impelled to take him in hand and compel him to abjure the Copernican theory on his knees before the Inquisition. Law was not less stern and intolerant. Near the close of the same glorious 16th century, the erudite but brutal Sir Edward Coke, as attorney general, exercised his tyrannical insolence towards Raleigh, in his famous invectives: "Thou hast an English face but a Spanish heart, art a damnable atheist," a "spider of hell," a "viperous traitor," etc. (Ib.). Fortunately for medicine, within this brilliant but discordant century were born two men of specially corrective genius, Vesalius of Belgium and Descartes of France—the one father of the science of human anatomy; the other, father of modern philosophy or "The science of science." The extreme bigotry of the times first questioned the hallucination of its own death knell per force of the intellect and industry of these two great exemplars.

In the meanwhile (1553) emperor Charles V. of Germany, published his Caroline Code requiring the opinion of medical men in cases of death resulting from alleged violence or suspected criminal agency. This was the practical beginning of Legal Medicine in Europe, although coroner's inquests in England, and some of the rules regulating them, date back as far as Edward I, and were probably of Saxon origin.*

From this chosen central point of view, we will not do amiss to look backward with critical estimate on medicine, and forward as to

*In a note prefacing his section on "Opinion," in his "Select Cases on Evidence at the Common Law," Professor J. B. Thayer cites the fact that "in 1353, in an appeal of Mayhem, the Viscount was ordered to summon skillful surgeons from London to inform the court whether a wound was Mayhem or not. The court had previously inspected it and could not tell."—Ed.

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the latter's influence on law, until we are agreed whether or no the delayed junction of these professions in medical jurisprudence has resulted or will result in permanent good to both, and to their constituent community.

The standstill, or, at best, inferior progress of medicine during the dreary, wearisome centuries of the Christian Era previous to the revival of letters is not difficult to account for. It was due primarily to the contempt for human life inculcated by prevailing philosophies; and, secondarily, to the existing spirit and chances of universal warfare. Dare we hazard here a speculative supposition? Had Alexander postponed his Indian Campaign and directed his energies toward Rome, thus protecting the influence which he initiated by planting his Greek colony at Alexandria, the chances are that the darkest Middle Ages would have been very different in history. The good of old Athens could have been preserved and Alexandria grown to a new and better Athens; and by so much earlier would degrading superstition have yielded to the light of science. For Alexander was a lover of learning as well as conquest. He could at a later date, have anticipated the Arabs in a grander importation and absorption of Indian and Egyptian knowledge and wealth. Alexander had been a favorite student of Aristotle; and the latter belonged to a long line of Aesculapians although diverted and corrupted by Plato's indifference to communal welfare of physical well being. In his earlier experience, Alexander was as humane in victory as he was terrible in battle. His magnanimity toward the household of Darius seems foreign to his age; and his devotion of the captured silver casket to the Iliad of his beloved Homer was in happy contrast with contemporaneous barbarity.

With the surrender of Alexandria into the hands of the Romans was lost for 1500 years all practical advance of human anatomy. Herophilus and Erasistratus only are remembered as its enthusiastic devotees at all comparable with moderns. They were allowed opportunities in the first part of the flourishing period of the Alexandrian schools unknown before or since until the Italian Renaissance. It is doubtful if Hippocrates had ever dissected the human body. And 600 years later Galen was obliged to go to Alexandria to study the human skeleton, while his students were sent to the German battlefields for their opportunities of dissection. Cruelty before death, and cremation after death were the rule at Rome. Apes and pigs were the sole anatomical material for learning, by analogy, the construction of the human body.

Pliny says that Rome got along very well without doctors for 600 years. But Pliny was prejudiced. He was an industrious compiler, a dabbler in medicine, and a failure in law. Did he forget Asclep-

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iades, one hundred and fifty years his senior, the medical scholar and orator, and intimate friend of Cicero? His curiosity led him to his death in watching the eruption of Vesuvius which buried Pompeii. The excavations at the latter place, eighteen centuries later have discovered an almost astonishing array of surgical implements, which belies his literal statement, though figuratively, he was half way right. Wherever Roman wealth was aggregated, Greeks were attracted and invited; and wherever Greeks were, there were philosophy and physic, whatever their character as judged from an inimical or distant standpoint. It is absurd, therefore, to suppose that Rome was without relatively good physicians at least 300 years before the Augustan Empire. The Hippocratic writings were well known then among the Greeks. And within half a century afterwards, the fame of Herophilus at Alexandria was wide spread, and his foreign students numerous enough that they must have included many Greek inhabitants of Rome as well as native citizens.

But that physicians had at this period any weighty influence in judicial procedures there is neither much evidence nor reason for surprise thereat. A matronal referendary was of more common use. Especial confidences between physician and patron, as were mutual with Galen and Marcus Aurelius, might reasonably have extended to important legal affairs. In fact they did. Reputations counted then as now; but not to a similar degree in frequency or utility, outside the military and legal professions, and rightly so. Indeed, had doctors possessed a much better acquaintance with the *foundation* of rational medicine; had that acquaintance led to ever so much popularity in its practice, it is doubtful if they would have been listened to in legal enactment or court decision, as were the moderns after the French Revolution. Rousseauism was the wild reaction against a corrupted extension of severe Roman Law. Benthamism was a conservative compromise between too much law and no law at all. It borrowed and utilized Dr. Priestly's maxim, "The greatest happiness for the greatest number." It softened the effect of the confounding calculations of Malthus. The maturing position of medicine could escape neither extreme, but it helped to make the compromise reasonable and tolerable.

The Greek's love of Rhetoric imbibed by the Romans and exercised in the Forum naturally took precedence, to the exclusion of the development of applied science. Philosophy, whether Stoic or Epicurean, despised utilitarianism; its end was purely idealistic, and evanescent so far as the realities of human life were concerned. Justice was preoccupied with property and power. There were understandings of lunacy and laws pertaining to it; laws regarding the person and its defense, but the instinct of *possession* was the force dominating

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those laws, and the benefit of the doubt was attracted or swayed by that force.

When then, Justinian says (Institutes) that the ruler of Rome should be not only victorious over his enemies but should show himself scrupulously regardful of justice by being armed with laws, we may surmise the field of that justice when we observe that Moyle's Translation of his Institutes devotes barely two and one-half pages to "Public prosecutions," or criminal jurisprudence. "Having," Justinian says, "removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and like sailors crossing the mid-ocean, by the favor of Heaven have now completed a work of which we once despaired." Under Title 1st (of justice and law) he says: "Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust." Surely this scope is broad enough to make any of us curious to know the contents of those fifty Pandects, which by mere good fortune were preserved for copying at Florence: so that, as Roby says (Introduction to Digest) "an accident in the 9th or 10th century might have destroyed any authentic knowledge of the bulk of Roman Law."

The Romans were no exception to overgoverned nations, by multiplicity of laws. The twelve tables of the Decemvirs were soon outgrown. Then, as now, the early mourners of a decadent republic often wished in vain for the temporary advent of a Zalencus whose Locrian subjects proposed all new laws *with ropes around their necks*, to be quickly tightened if their innovations were rejected. Notwithstanding the complex multiplicity of laws hinted at by Justinian, this must have pertained to rights in property almost solely: questions of "persons," "things," and "actions." For, as Gibbon remarks, "The penal statutes form a very small proportion of the 62 books of the Code and Pandects; and in all judicial proceedings the life or death of a citizen is determined with less caution or delay than the most ordinary question of covenant or inheritance.

Here and there through the Code of Justinian are provisions of a Medico-legal nature, some of which, says Beck, are incorporated into the laws of almost every civilized country at the present day. Even as far back as the time of Numa Pompilius (715-652 B. C.) laws were grounded on the authority of physicians and philosophers, as Jewish and Egyptian laws had been many centuries before. *Propter auctoritatem doctissimi Hippocratis* was a phrase frequently met in the decisions of the Romans (Beck). But "there is no evidence of laws ordaining that physicians should be examined on any trial until after the middle ages." The same writer says that it is unlikely that any real

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autopsy was performed on the body of Julius Caesar when Antistius declared that out of 23 wounds received, but one was fatal, viz: that in the thorax between the 1st and 2d ribs. Declarations of deaths by poisons must in those days have been made on suspicion and suspicion only. For what did they then know of analytical chemistry?

The rise of chemistry as a salient factor in medical jurisprudence is due in its inception to the Arabs; and in its mature status to the French, identified particularly with the name of Orfilla. If delusions are a proof of insanity, then the world, particularly doctors, ought to be thankful for the insanity of Mahomet, and admit that some delusions, at least, have proved healthful. For had it not been for the Arabians, after the barbarian conquest of Rome, medicine would have lost not only the impetus which the Greeks gave to it, but also the very important additions contributed by the Arabs independently. And had it not been for Mahommedanism, Arabian unity and progress would have been impossible. We delight in the contemplation that, through gunpowder, the printing press, and the rebellious intellect of Descartes, the rapid progress between the 16th and the 19th centuries has been conspicuous as a common and exoteric legacy. We are prone to forget that this proud period was the legitimate offspring of an analogous and preparatory epoch under Arabian superstitious rule from the 9th to the 11th centuries inclusive. Baconian utilitarianism was the sequence of opportunity made possible by latin translations of Arabic scholarship which preserved and utilized Greek learning; which added its own proficiency in mathematics, alchemy and pharmacy; which transported for us some of the hidden and isolated mysteries and knowledge of India and Egypt; which in a measure made success out of the failures of Alexander. We look back with derision upon the delusions of the alchemists in search of the philosopher's stone and the elixir of life. But delusive as it was, alchemy was not beneath the long and serious study of Roger Bacon, Albertus Magnus and the giant intellect of Thomas Aquinas. Out of alchemy sprang chemistry. Out of chemistry sprang the subtlest of materialistic philosophy and modern commercialism. And without the latter it is to be feared that our own professional incentives would be heavily discounted. The school of Salerno and the monasteries of Europe aided the preservation of Greek medicine and further developed it, but in no such practical degree as did the Arabs in the Middle Ages at Cordova and Baghdad.

But while the Arabs were enthusiastic students of Greek literature, while they originated pharmacy and gave chemistry its first impetus toward a science, they, like the Romans, failed in anatomy. Dissection was proscribed by their religion. An anecdote of rather recent date is told by Dr. Keene (Practical Anatomy, Early History of) of

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one Clot Bey who died about 30 years ago. He was the first public lecturer on anatomy in Alexandria since about 1700 years. So strong was Musselman prejudice and hatred that "although under the protection of Pasha Mehemet Ali, when he first opened the thorax of a body a student rushed upon him and stabbed him with a poniard. The blade slid over the ribs, and Clot Bey perceiving that he was not seriously hurt, took a piece of plaster from his dressing case and, applying it to the wound, coolly observed to the class: "We were speaking, gentlemen, of the disposition of the ribs and sternum, and I now have the opportunity of showing how a blow directed from above has so little chance of penetrating the Thorax" and went calmly on with his lecture.

The foundation of chemistry, and its bearing on law, was in a measure an accident of conquest. On the contrary the later revival of human anatomy was due to the accidents of peace and favoritism of lawgivers. Its reciprocal benefit in law came later on. The last two centuries of the Middle Ages were, indeed, clouded over Europe; but it was not all darkness. There was renewed and added sunshine at the commercial centers of Italy. The universities had become famous and were the scattered Meccas of Science. Salerno attracted students until it was closed by Napoleon. But it was outstripped in the 14th and 15th centuries by Bologna, Padua and Pisa in their liberality toward innovations. The fame of Galileo as the creator of experimental science was won by the encouragement and liberality of the Italian schools in aid of his genius. If his insolence led to dishonor it was not the fault of his patron benefactors. The sentiment in favor of direct instruction in human anatomy was well turned when Vesalius was attracted to Bologna from Paris where he had been obliged to hide his stolen gallow's birds in his own bed. Here he became the founder of correct descriptive anatomy. Galen's anatomy of the ape lost its prestige through Vesalius in 1543. Bologna, the oldest of the Italian universities, was founded as a school of Roman law 1119 A. D. The faculties of medicine and arts were added much later. Here, two centuries before Vesalius was born (1514) the first dissections under Christian rule were made, but they were of too infrequent occurrence to put anatomy on a lasting basis before the time and genius of Vesalius. Here multitudes of students flocked from everywhere, to receive instruction from professors, who in their turn gained world wide renown, and this renown was not limited to those of the male sex, be it said to the credit of all concerned.

Vesalius' birth at the commencement of the great reformation, set in motion by Luther, marks for the physician the close of the Dark Ages, and the initial movement of the 16th century, which has slowly

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but steadily grown to the mid-day splendor of an undisputed scientific age. Bacon was born in 1561 and Descartes 35 years later. Both were trained, to a suffocating degree, in the dominant atmosphere of Aristotle, and both resolved to set themselves free. They opened to the world a new view of the practical side of life. Hitherto there had been a waste of talents in an endless jargon of disputations, esoteric and futile in their daily application. As Macaulay puts it, "it would have been hard to persuade Thomas Aquinas to descend from the making of syllogisms to the making of gunpowder." "It would have been hard to convince Seneca that the inventing of a safety lamp was an employment worthy of a philosopher." "It was not by furnishing philosophers with rules for performing the inductive process well, but by furnishing them with a motive for doing it well, that he (Bacon) conferred so vast a benefit on society."

Harvey published his discovery of the circulation of the blood in 1628, twelve years after the death of Shakespeare. The practical merit of that disclosure is as universally acknowledged as the later exposition of natural laws by Newton. But be it remembered that Harvey's demonstration was incomplete. The induction lacked verification by the more perfect lenses ground by Lleeuwenhoek and the philosopher Spinoza, both born in Holland in 1632 under very different circumstances and destined to reach their ultimate fame by different ways, but both equally adepts in their humble avocation of lens grinding while serving their early apprenticeship—the one as a necessity of livelihood, the other in obedience to a wise custom of the earlier Jews in compelling their sons to learn some useful trade which might serve them well in case of adversity. That adversity came to Spinoza when he was expelled from the synagogue and ostracized by his friends and co-religionists. Harvey's dissections and pupilage at Padua, Italy, prepared him for the satisfactory interview and patronage of King Charles; also for the jealous abuse and wrangling of his rivals and compatriots in England. But it remained for an Italian, Malpighii, born in the year of Harvey's public announcement, and educated at Bologna, to make use of the Dutch lenses and add proof to the world that Harvey was right. He established for himself the distinction of being the founder of microscopical anatomy, an event which paved the way, later on, for the development of a true basis of physiology and pathology. He blazed the path for a greater French genius of the last century. That genius was Bichat, who died (1802) a martyr in his loyalty to his profession and to his master, (Desault) at the age of 31. In that short span of life, Bichat did for anatomy, physiology and surgery by his industry and mental aptitude, what has been unrivalled by any individual, Hunter scarcely excepted, though styled "the father of modern surgery." Bichat "established an epoch in biology." He

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was "the father of scientific histology and pathological anatomy." A late and competent writer (Nordeau) has said "there is no middleman between Aristotle and Bichat." Bichat's work was a fitting supplement to that of Hunter, the English anatomist; also to that of Haller, the Swiss physiologist. The latter did honor to Boerhave, as his pupil at Leyden; honor to his country as teacher and writer, with wonderful diversity of talent; honor to humanity at large as deserving the distinction of being "the father of modern physiology." Together with Lavoisier, as chief founder of modern chemistry, these men's lives stand out in bold relief as pioneers of the last century, making the way easy for the establishment of medicine at the present day upon a rational and respectable footing, which has compelled the attention and modified the process of reasoning of every worker in every avenue for the advancement of a happier and more perfect civilization. Jurisprudence and jurists, if longer resistant, have neither refused their attention nor escaped the change made obligatory by the changed mood of the law-making and law-obeying communities in which they exist. No community in history has escaped the mood which prevailing philosophy has made for it. No formative philosophy has ever been propounded that was not influenced to some extent, sometimes greatly, even originally, by the prevailing genii of medicine. Some of these genii have been good, some have been bad; some of them have been self-made, some of them have been made by theology and law. The good genii of the last century were eminent enough to drive out witchcraft from the pleas and judgments of bar and bench, and made room for the practical teaching of Pinel and Esquirol. *The New Psychology* is picking its own way slowly but surely out of the old shell of metaphysics. Theology is modernizing its temples.

The first text book on medical jurisprudence was published in Italy in 1598. Others followed. Germany and France soon took up the work in their order, the latter country soon distancing all others in the amount of this literature. Dr. Farr published the first English text book in 1798. When the first Professorship of this special branch of study was established in a British University in 1806, it was the subject of ridicule in the House of Parliament (Beck). What was meant by this science anyway? cried the suspicious wiseacres. Today this particular literature constitutes a very respectable library by itself.

Dispassionately considered, medicine, in its relation to law, has been recognized just about as fast as it deserved to be. Exceptionally, if one is inclined to be easily disgruntled, he may be reminded of the closing paragraph of the historian's estimate by Burns in *Heroes and Hero Worship*. Quoth Carlyle: "Richter says, in the Island of Sumatra there is a kind of 'Light-Chafers,' large fireflies, which people stick upon spits, and illuminate the ways with at night. Persons of condition can thus travel with a pleasant radiance which they much admire. Great honor to the fireflies. But —" And here it ends.

DR. B. W. HOLLIDAY.

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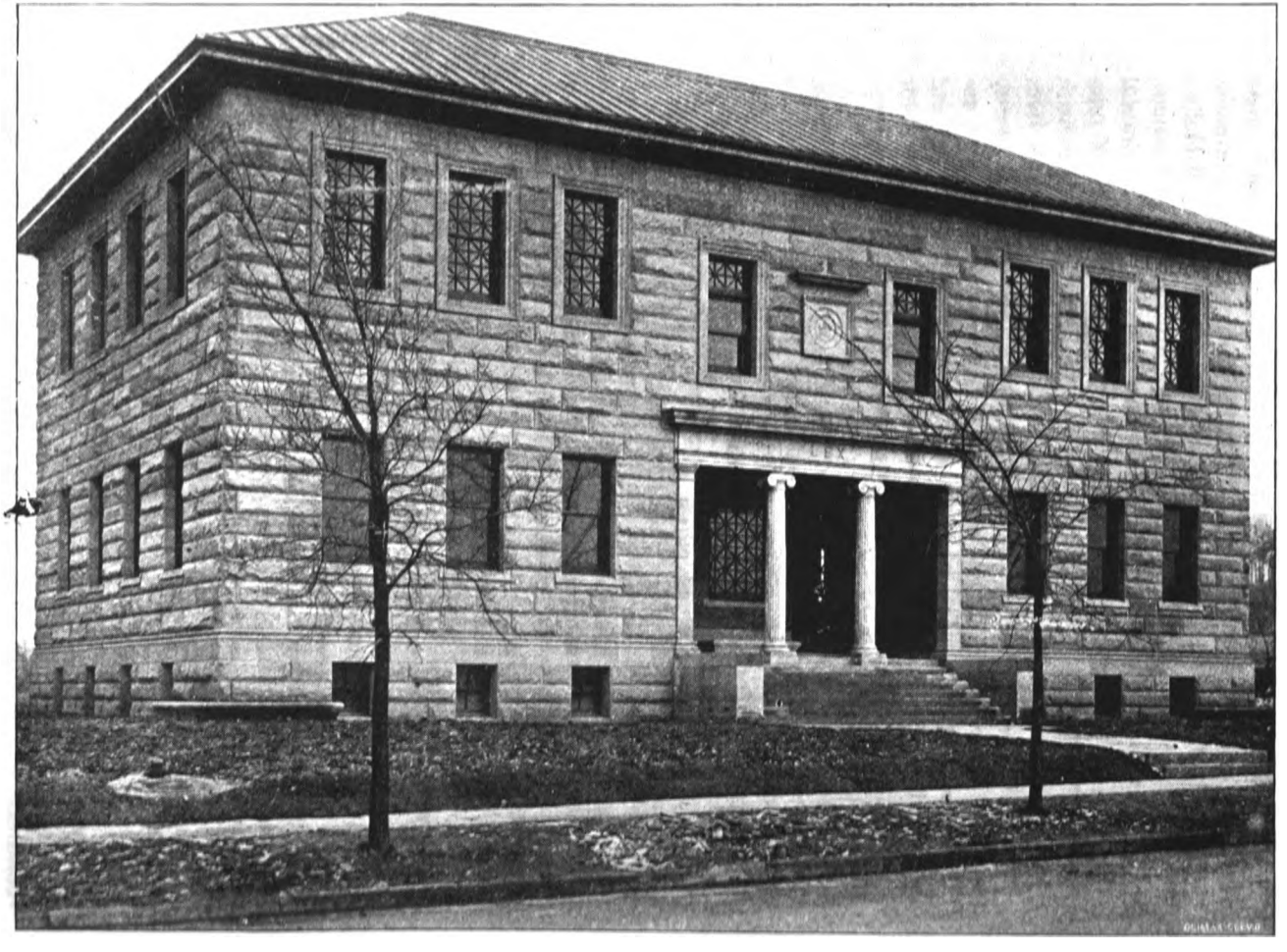

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The Study of Law.

There is, perhaps, no better way of gaining a correct conception of what our department of law is doing for its students than to determine, if possible, what it ought to do for them, and to give a brief outline of what other schools have done for their students.

It will be generally conceded, we believe, that the Law School should aim to make its students good lawyers in the best sense of the term. What then, are the qualifications of a good lawyer? We take it they are:

1st. A thorough knowledge and appreciation of the fundamental principles of positive law.

2dly. The power to apply these principles almost instinctively to any of the infinite number of combinations of facts or circumstances arising in the daily experience of the community.

3dly. The power to discriminate between right and wrong in the many delicate and difficult questions of duty which are continually arising, and a character of such sterling integrity and honor as will enable him unconsciously to resist what to weaker characters would be irresistible temptations.

It should therefore be the aim of the Law School to send forth its graduates thoroughly equipped with all these qualifications.

The qualifications as to knowledge of legal principles and the power to apply them can be developed to a comparatively high degree in men of ordinary ability who are anxious to do their best work. The best methods, however, of acquiring these results could not be devised at the very outset, and the teaching of law has had much the same history as the teaching of the natural sciences, the method first adopted being the Lecture system.

There can be no doubt of the great benefit which the lecture system brought to the teacher, but what was the effect upon the student? Experience has proved conclusively that the great tendency under such instruction is for students to confine their energies to the taking and memorizing notes of lectures, however much they may be urged to study the subject in text books and cases. In some schools where this method is still in vogue it is not an uncommon thing to find teachers delivering exactly the same lectures this year that they delivered ten or twenty years ago; and it is in some schools possible for students to buy printed copies of the lecture notes, which may be read a few days before examination by the one who has habitually absented himself from lectures, and, if he have a good memory, he may pass a brilliant examination. But the man who has done but six or eight weeks of hard

An address delivered at the University Commencement, June 23, 1897.

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work during his entire law school course can hardly be said to have acquired a thorough knowledge and appreciation of the principles of law. The rules that he memorized in so short a space of time will doubtless be forgotten in an almost equally short time and none of the qualities which go to the making up of a well trained lawyer have been acquired. His legal training must begin after instead of before his admission to the bar.

Realizing the inadequacy of this system, the late Professor Dwight, when called to the head of the Columbia Law School, in 1858, devised and introduced the so-called Text Book system. The great advantage of this system was that it required students to come to class prepared to recite on a certain number of pages of some selected Text Book, the teacher giving such explanations as he deemed necessary. The success of this system at Columbia soon led other schools to set aside the old method and adopt the new, which is still used in a large majority of the law schools. But when Professor Langdell was called to the Harvard Law School in 1871 he expressed the opinion that both the old methods were entirely inadequate for the training of lawyers. Agassiz had only a few years before introduced his method of teaching biology and other natural sciences by sending his students to nature rather than to text books. So, too, Professor Langdell contended that students should be trained at the very outset of their legal careers to seek out the principles of the law from their sources rather than from text books.

The great body of our Common Law is derived from Statutes, Decisions of Courts and the writings of eminent Jurists. Of these three sources of our Law, that of Court decisions is by far the most important. These decisions have been rendered in contested cases in which both sides have been represented by attorneys thoroughly prepared to argue the case from all possible standpoints of reason and justice. From time to time lawyers have endeavored to set forth the various rules of law as established by these decisions in treatises and text books, and out of this host of text writers there have occasionally emerged great jurists whose scientific and masterly treatment of their subjects has done much to crystalize and perfect our law. This class includes such names as Bracton, Littleton, Coke, Hale, Blackstone, Kent, Story and Greenleaf. These names have become so thoroughly woven into the warp and woof of our law that no man can claim to be a well trained lawyer who is not thoroughly familiar with most, if not all of them.

Professor Langdell therefore contended that the law student, instead of being confined to some one text-book, should be trained to seek out the law from its sources wherever found, whether in statutes,

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decisions or text-books. But as much the greater part of our law is derived from decisions, much attention must of necessity be given to the study of cases containing these decisions. A careful study of the facts, arguments, decision and opinion in such a case will reveal to the student not only the principle or rule of law involved, but also the reasons for such rules and their proper application.

Professor Langdell therefore devised what has unfortunately been called the Case system. According to this method, the teacher on taking up a given topic for study selects the cases which first established the law involved in the topic. The student then reads the facts of the case, and decides for himself how the case should be decided, analyzing his own reasons therefor. Having decided for himself, he then reads argument of counsel and passes on to the decision of the court and its reasons therefor. Wherein is his decision like or unlike that of the court? If the court differs from him is he satisfied by the reasoning of the court that his own decision was erroneous? Or does he think the court wrong? Courts are not infallible. Even our own United States Supreme Court has reversed its own decisions in more cases than that of the Income Tax, and has said to-day that its decision of yesterday was erroneous. Why then may not the student criticize such decision? This student comes to class prepared to attack the decision. Another doubtless comes prepared to defend it, and a battle royal ensues at once with the teacher acting simply as umpire, and if the one in error is not convinced by his adversary, one or two hypothetical cases by the teacher will usually show him his error. In the meantime every member of the class has taken sides, tacitly if not orally, and when a decision is reached which satisfies every member of the class as well as the teacher, these students have learned this rule of law and its proper application to facts in a manner which could never be learned from text-books and lectures.

This method has also the great advantage of training students to think quickly, to reason accurately, and to express their thoughts concisely and forcibly. The student who is meeting the attacks of three or four fellow students and endeavoring to overthrow their position while establishing his own, is doing work which is not altogether unlike much of the actual court work of lawyers. But in the meantime these students and teachers have searched out the leading text-books and some of them come prepared to quote the opinions of these writers. These statements are then open to the class for analysis or criticism, and conclusions arrived at as to their truth or falsity. In this day of mercenary law book writers and law book publishers, not a few works are thrown upon the profession which contain many gross errors. The only safe lawyer is therefore the one who can seek out the law for himself and discover such errors.

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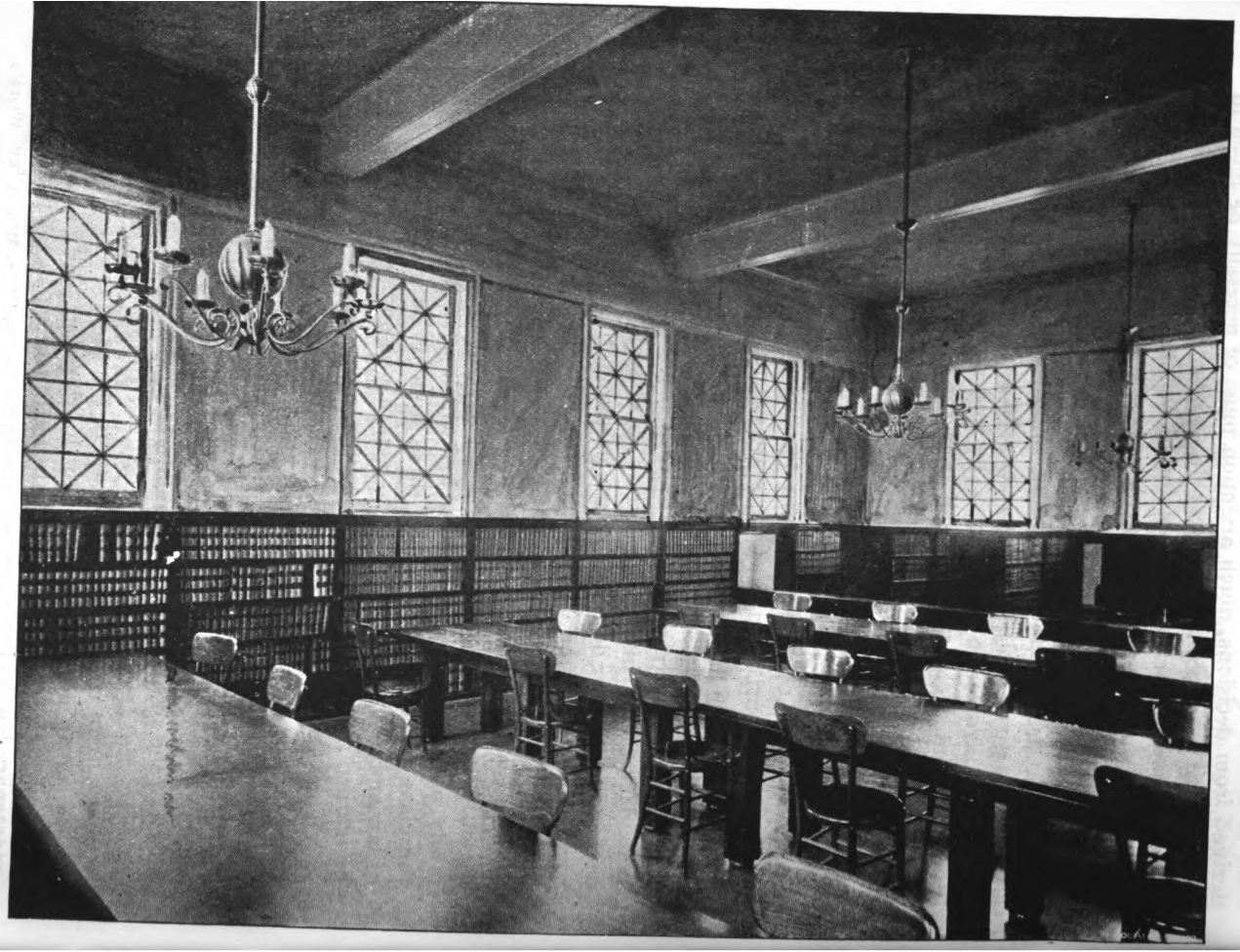

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Then, too, conditions are changing continually and rapidly, and problems of worldwide interest and of the utmost importance are continually confronting our courts and lawyers. As for example: while political economists of the various schools have been praising or condemning the laws of free competition, the courts have been called upon to take part in this discussion and arrive at conclusions which they must apply to the dealings of mankind with each other. In 1853 a case was brought before the English courts founded upon the following facts: an English theatrical manager had entered into a contract with a famous German operatic singer for an engagement of several months. A rival manager induced her to break her contract and enter into one with him. The first manager brought an action for damages against the second, his sole claim being that his rival had induced the breaking of the contract solely for the purpose of securing the services of the singer for his own house. In other words it was nothing more than a case of competition between rival business men leading to a breach of contract. The majority of the court were decidedly of the opinion that the plaintiff ought to recover damages, but their reasoning was extremely unsatisfactory to the profession.

In 1881, in a similar case the court conceded that the opera singer case was not decided upon satisfactory grounds, but they rested their decision upon the broad ground that whoever for the mere purpose of benefiting himself or injuring another procures the breach of a contract is liable to an action for damages, and to-day this rule of law seems to be well established both in England and America, so that whoever for his own benefit, or for the purpose of injuring another, persuades the employer to break his contract with his employee, or the employee to break his contract with his employer, is liable to an action for damages. The law to-day is the same in all contracts, whether for labor or otherwise, and when a man makes a contract all the rest of the world must keep hands off except in case of lawful excuse. The courts have therefore placed this restriction upon free competition, and business rivals can no longer go to the point of procuring breaches of contracts simply to benefit themselves or prejudice their competitors.

But how about the case where there is no contract but where parties are about to enter into one? As where an engineer is about to be employed by one railroad superintendent when the superintendent of another road interferes and through his persuasion the engineer is not employed. Can there be any cause of action there? One of our Circuit Courts has already answered this question affirmatively, and if this ruling shall become the law, then the striker or other person who persuades a man not to go to work will also be liable to an action for damages to the prospective employer, and courts will have taken the

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position that not only must a man not be interfered with in contracts already made but in contracts about to be made also. And if the courts shall ultimately take this ground, what will become of the so-called right of free competition? Such is only one of the many problems confronting our courts. Another illustration is that of the modern use of the "writ of injunction" which we cannot now discuss, but which is a problem of the greatest interest and importance to humanity.

If such are the problems which must be entrusted to our future lawyers for solution, and upon which depends the future character of our civilization, a solution in which any mistake, however seemingly slight, may bring disaster and calamity to humanity, are we not then justified in maintaining that these future lawyers shall not be allowed to enter the profession until they have acquired a thorough knowledge and appreciation of the fundamental principles of law, and have acquired the power to apply these principles to the many complicated combinations of circumstances of every day life? These qualifications can be acquired at a law school which is properly organized and conducted. But how about the qualifications of character?

While the law school, like all other schools, cannot aim directly to develop character in its students, much may be done in this matter indirectly. I take it that by far the most valuable training received by our children in our public schools is the character training. It is true that none of our public schools have any special course of study for character development, but this work is nevertheless done and that more thoroughly than any of the prescribed work. Scholars may forget the rule of the square root, the tables of weights and measures, the rules for computing bank discount, the distinctions between nouns and pronouns, verbs and adverbs, but the moral principles unconsciously learned from high minded men and women they will never forget. The same thing is true of our colleges and professional schools. Unconsciously the student learns his lessons in character building from his teachers, and the officials who have in charge the selection and appointment of teachers should take into consideration first and above all else the character of the teacher about to be chosen.

By placing upon its Faculty only men of high character the law school can exercise an influence for good on its students which cannot be overestimated. Especially is this true where cases are studied. In these cases we are continually studying the conduct of men toward each other. The word of approval or disapproval of such conduct made by the teacher from time to time is a continuous ethical training. Then, too, in the discussion of cases the question of moral right or wrong is repeatedly used as the touchstone in determining whether a decision is right or wrong, and many of the opinions of eminent

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English and American judges are brim full of the soundest ethical doctrines. Surely the student who has spent three of the most impressionable years of his life midst such influences should have attained more than ordinary strength of character, and should have acquired the power to distinguish right and wrong in the many delicate and difficult questions of duty arising in his professional life. It has been said that the lawyer should be the keeper of his client's conscience. We believe that men of the character just described can be safely intrusted with this duty.

But the duty of the lawyer to the community at large is of infinitely more consequence than his duty to his client. During the past, in times of great public trial and confusion, the people have invariably turned to the legal profession as their deliverer. In the dark days immediately following our Revolutionary war, when everybody felt the absolute need of Union of the Colonies, but when jealousy of rights and suspicion of each other seemed to make such a Union an impossibility, such lawyers as Hamilton, Jay and Madison came to their country's aid and in spite of what seemed an overwhelming opposition gave us our National Constitution. It is impossible to measure the debt which we owe to that great and magnificent lawyer, Marshall, whose decisions did so much to give stability to our government.

In every great movement since the founding of our government lawyers have always been the leaders. Their training is such as to make them leaders. They are compelled every day of their lives to look at questions from all sides and carefuly weigh and analyze objections and advantages. The legal profession has, therefore, very naturally furnished four-fifths of our Presidents; three-fourths of our Vice Presidents; nine-tenths of our cabinet officers; two-thirds of our senators; one-half of our Governors, and one-half of our Congressmen. Are we not, therefore, justified in saying that all of our great public problems have heretofore been solved by lawyers? There are still many problems of the utmost importance to our country and to humanity which must be met and solved during the coming years. We believe that America should occupy a foremost position in the solution of these problems, and American lawyers will be relied upon in the future as they have been in the past. Is it possible, therefore, to lay too great stress upon the importance of requiring of our future lawyers the highest and best training possible before entering the profession?

Five years ago when our law school was organized, our Board of Trustees decided that this new department should be a worthy member of the University and the aim should be to train good lawyers rather than many lawyers. With this in mind, a three-years' course was de-

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cided upon. At that time there were hardly more than five law schools in the country requiring three years' work for the degree of LL.B. Many were the criticisms offered by members of the profession, and even the friends of the school held their breath when this was announced. Many were there who prophesied that the school must either come to a two-year basis or close its doors. But the Trustees and Faculty never even considered such a proposition, and to-day, after an effort extending over only five years, we have a graduating class of fourteen men, and during the past year we have had enrolled in our school seventy-two men, nearly all of whom were determined to spend the entire three years at the school.* The method of teaching used is, for the greater part, the so-called case system, which is now used at Harvard, Columbia, Cornell, Pennsylvania, Northwestern, California, Leland Stanford, and several other leading western schools.

Lawyers who did not fully understand this system did not hesitate to give this as an additional reason for the inevitable failure of the school. But five years' experience has shown that, instead of being a source of weakness, it is a source of great strength. A very large portion of whatever success has attended the institution is due to our student body, and our students are without exception firm believers in this method of training lawyers.

But we care not to lay too much stress upon methods. Our first and greatest aim is to send into the legal profession men who are in every way qualified for the great responsibilities and duties of their calling; men who are so trained as to become in due time not only leaders of the bar but leaders of public opinion also; men of whom it may be truthfully said that the world is the better for their being in it.

EVAN H. HOPKINS.

*Since the above was written a new freshman class has entered with forty-six members.

Attending to business.—Magistrate—You say the officer arrested you while you were quietly minding your own business?

Prisoner—Yes, your Worship.

Magistrate—You were quietly attending to your own business, making no noise or disturbance of any kind?

Prisoner—None whatever, sir.

Magistrate—It seems very strange. What is your business?

Prisoner—I'm a burglar.

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Work of the United States Supreme Court.

Let me give an insight into the way business is transacted in this court: Five days are given each week to the hearing of arguments, the court convening promptly at twelve and adjourning as promptly at four, and these hours are fully occupied by arguments of counsel. Everything is placed before us in print, records and briefs, each justice having a copy. On Saturday we meet for consultation, and the cases argued during the week are brought up for discussion. Each justice is expected to have made full examination of each record and the questions involved before that time, and if anyone has not done so the consideration is postponed one week or until all are ready. As to the vigor and earnestness of these discussions I can only say that I have never known anything to equal them. Oftentimes cases are continued from Saturday to Saturday for further discussion and consideration. When discussion is at an end the roll is called and a vote taken. Each justice is entitled to a book in which is entered on each page under a blank space for writing the title of a case, the names of all the justices, by means of which he may, if he desires, keep the vote of every justice in every case. I can, by turning back to the books which I possess, ascertain the vote of every justice in every case that has been considered and determined since I have been on the bench. It often happens that differences of opinion which are indicated by the vote do not appear in the result as announced from the bench, for they who in fact dissent do not consider the question of sufficient importance to publicly record such dissent.

Saturday night the chief justice, to whom is assigned the duty of distributing the cases among the justices, sends around a slip showing what cases he has assigned to each justice for the writing of the opinion of the court. This duty of assigning cases is a most delicate one, and could, if unwisely discharged, provoke no little irritation. To the great credit of the present chief justice be it said that no one could be more fair and wise than he in such distribution. Up to the time of receiving this slip no one knows what causes he will be called upon to prepare the opinion in. Thereafter, at such time as he has at his command, outside of the hours of session, he writes the opinion. When written it is sent to the printer; nine copies are stricken off, one given to each of the justices, by whom it is examined, criticised, and returned with the criticism to the writer. After this it is again brought up in conference, the suggestions and criticisms are considered and approved or rejected. These criticisms run both to the matter of argument and style, things omitted and things inserted, and oftentimes the corrections are so far-reaching that the opinion as finally announced bears little resemblance to the one originally prepared. When upon this action the opinion has been placed in such form as is acceptable to the majority, it is ready to be announced on the succeeding Monday morning.—Mr. Justice Brewer in the "Kansas Lawyer."

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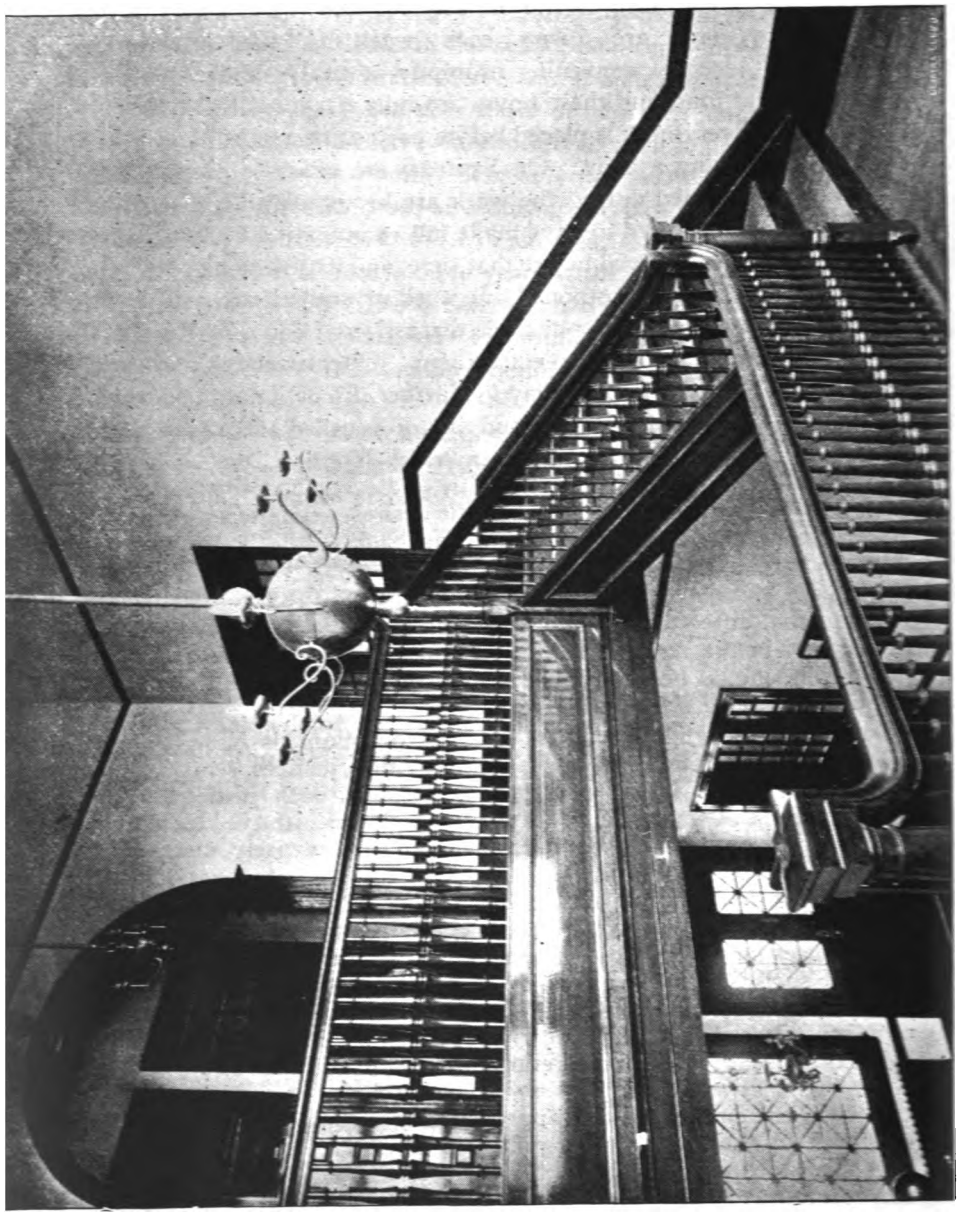

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

In taking up the work which has been so worthily carried on during the past year by their predecessors, the members of the new board feel that they have undertaken a task which will require the exertion of their best efforts. In our work we shall pursue the same general policy as heretofore. To furnish a magazine which will serve to assist those who are "preparing for untying the knots and solving the enigmas of jurisprudence," and to offer instructive and entertaining matter on legal topics to all those interested in the science of the law, shall be our constant aim.

More attention will be devoted to the department of Recent Cases. Nothing is more essential to an up-to-date lawyer than the study and observation of the tendency of the law as embodied in the current decisions. We shall endeavor to abstract the more important decisions which show some progress or tendency of the courts, or the stand taken in the different jurisdictions on mooted points, adding short comment or citation when practicable.

We trust that the results of our endeavors in the future may show as steady an advance of the JOURNAL in legal favor as have those of former editorial boards.

Since the going to press of this number an incident has happened which will doubtless be of much interest to the alumni and friends of the Western Reserve Law School. At the bar examination held in Columbus on June 8th and 9th Mr. Harry J. Crawford, a member of our graduating class, received the highest examination mark of any of the 209 applicants for admission, his grade being ninety-one and nine-tenths, the nearest grade to him being ninety and four-tenths. Of the four law schools represented at the examination the average standing of the Western Reserve boys, we are told, was higher than that of the students of any other school.

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The new enactments are many and varied. Two of the more important ones are the Anti-Trust Law and the Act Abolishing the Death Penalty.

The Anti-Trust Law, enacted after an extended investigation of trust interests in this State, provides heavy penalties for violation of its provisions. A trust is defined as a "combination of capital, skill or acts, by two or more persons, firms, partnerships, corporations or associations of persons, for the purpose of creating or carrying out restrictions in trade; limiting or reducing the production, or increasing or reducing the price of merchandise or any commodity; preventing competition in manufacturing, transportation and sale or purchase of merchandise, produce or any commodity; fixing any standard or figures whereby prices to the public are established or controlled." There is also a provision regarding the transportation of merchandise or other commodities by railroads. Violation of the provisions of this act are declared conspiracies against trade, and the violator subject to a fine of from $50 to $5,000, or from six months to one year's imprisonment, or both. Corporations, foreign or domestic, violating the law forfeit their charters.

Whether this law will prove more effective than those in force—or better in the books—in other states is doubtful. Probably the majority of our states have enacted laws directed against these huge combinations, as also the federal government, but there have been exceedingly few prosecutions under them. The law on the subject in this country is a chaos of contradiction and confusion, while in England the courts, in Mogul Steamship Co. v. McGregor, 23 Q. B. D., 598. seem to have settled the question favorably to combination.

The popular view is undoubtedly adverse to the combinations and in accordance with the statutes on the subject. Should that view be generally adopted, however, it is not improbable that it would make "unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits," as well as "all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition."

The act prohibiting capital punishment is in line with the action of Congress, which, about a year ago, passed an act whose purpose it was to reduce the number of cases under the jurisdiction of the federal courts in which the death penalty may be inflicted. Just as in earlier years the death penalty was removed from the crimes of larceny and robbery and limited largely to cases of homicide, the tendency at the present day seems to be in favor of restricting its infliction to the most aggravated cases of homicide.

The Ohio act provides that in cases of first degree murder—the only crime punishable by death—the judge shall sentence the prisoner

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to life imprisonment when the jury shall add a recommendation to mercy. It cannot be denied that it is impossible to exercise too much care in meting out the death penalty. Whether it is the wisest plan to leave the question so completely to the jury may perhaps admit of doubt, but certain it is that the legislature has responded to popular sentiment, which seems to be getting farther and farther away from the "eye for an eye and tooth for a tooth" doctrine. The members of the legislature deserve the thanks of their constituents for taking such an advanced ground on this question, which will result in taking life only in those cases where guilt is clearly established and the criminal beyond hope of reform.

Attorney-General Monnet, of Ohio, recently handed down an opinion which, at the present time, is of much importance. A state senator asked whether he could accept a commission as captain of the army and retain his senatorship. Mr. Monnet concludes that he cannot. The question is whether the two offices are incompatible either in their nature or made so by the U. S. constitution or statutes. "It is my opinion that your being commissioned in the United States service as captain, being under the President of the United States as commander-in-chief, such a commission vests you with an office within the meaning of the state and federal statutes, taking into consideration the nature of the two positions, the duties required of you in each, that even in the absence of constitutional or statutory prohibition, they would seem to be incompatible."

There have been some inquiries as to the ability to procure back numbers of the JOURNAL containing articles by Dean Hopkins on "The Status of Married Woman at Common Law," and those containing the bar examination questions. The business manager will be pleased to send such copies on receipt of price.

The present issue of the JOURNAL has been delayed, in order to enable us to publish the spring bar examination questions. The remainder will follow in our first issue next fall and subsequent numbers.

It is a source of gratification to the Board of Editors, and chiefly to the Business Management, that during the past year much goodwill has been manifested by the students toward those who advertise in the columns of The Journal.

"Patronage to those who patronize us" is one of the chief essentials to the successful maintenance of college journalism. The new board is confident that the student body will remember the above motto and continue the custom.

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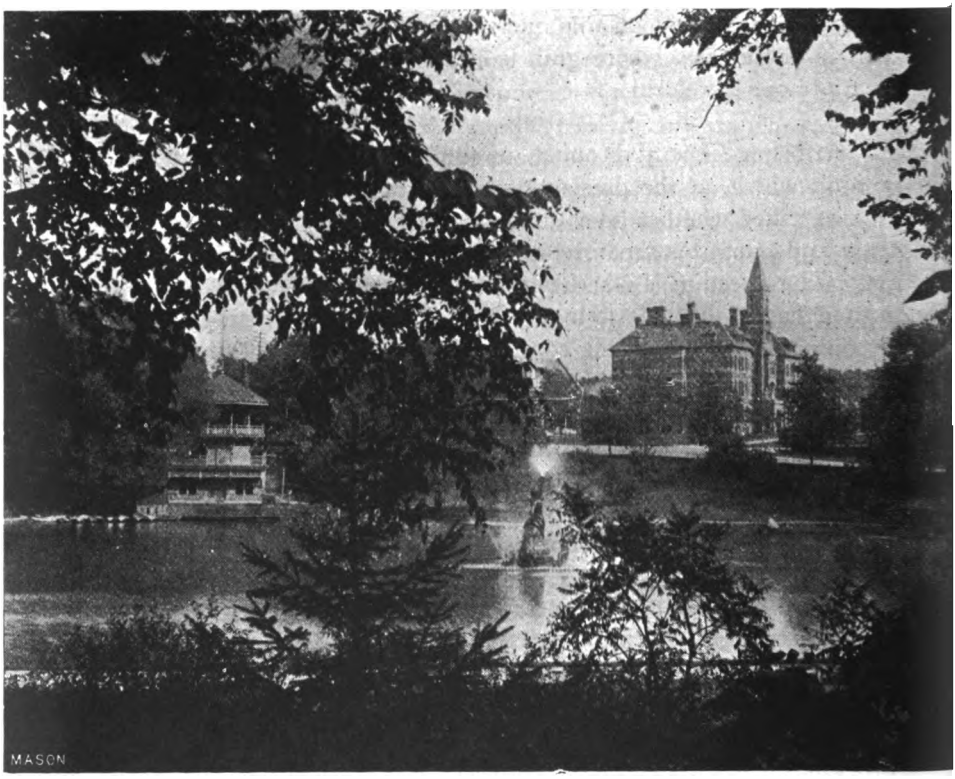

VIEW ACROSS THE CAMPUS.

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Supreme Court Bar Examination.

JUNE 7, 1898.

SURETYSHIP.

1. When a surety has paid the debt, what are his rights against the principal? against his co-surety? against indemnity held by co-surety?

2. A surety purchased the debt at a discount. To what amount is he entitled to contribution from co-surety?

3. Where one partner on the dissolution of a firm agrees to assume the firm debts, and a creditor of the firm with full knowledge of the agreement between the partners, makes a valid agreement to extend the time for payment to the partner who has assumed to pay the debt, how, if at all, does that affect the liability of the retiring partner?

4. The owner of a piece of land executed a mortgage thereon and afterward sold it subject to the incumbrance, which the vendee expressly agreed to assume and discharge.

What is the liability of the vendor and vendee respectively to the payment of the mortgage?

5. A gave his note with two sureties thereon. After note was negotiated a brother of A voluntarily gave one of the sureties a mortgage to indemnify him. A and the surety who held the indemnity became insolvent. After debt paid by the other surety why was the indemnity mortgage not liable to be subjected to pay the note?

6. But suppose the indemnity had been given by the principal instead of his brother why would the indemnity have been subject to payment of the debt in full?

DOMESTIC RELATIONS.

7. A man twenty years of age is sued for breach of promise of marriage. He pleads infancy by way of answer. Is the answer good against demurrer? Why?

8. A husband and wife, residents of Ohio, disagreed as to moving to a new location in the State, the husband moving alone. After three years what would you advise as to the rights of the parties to divorce?

9. (a) What is meant by "fellow servant?"

(b) Is a master ever liable for neglect of a fellow servant? Given reason.

10. A, a hackman, pending repairs of his own vehicle, hires a hack and horses of B, a liveryman, for one month. During that time A, through neglect, permits the hack to become defective, and a passenger is injured. What would you advise the passenger as to his rights?

11. Without any authority or permission from her husband, a wife incurs a bill of $50.00 for clothing for herself. What state of facts must exist to entitle the merchant to recover of the husband?

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CONTRACTS.

12. Give five necessary elements in the making of a contract.

13. What is the distinction between an express contract, a contract implied in fact and a contract implied in law? Give illustrations.

14. (a) What affect, if any, is given to a written instrument by affixing the private seals of the parties?

(b) Does it make any difference in the evidence required to prove a written contract, if the signatures of witnesses are affixed thereto, though not required?

15. A is a cotton dealer. He writes B, "I will sell you 100 bales of cotton at $50.00 per bale." B replies, "Send me 50 bales immediately." A ships B the fifty bales, which B receives and uses. A charges B $55.00 per bale—the market price, which B refuses to pay, claiming to be liable for $50.00 per bale only. A sues B. What is the measure of damages, and why?

16. A loses $100.00 on a wager to B, and gives his note for $100.00, due in thirty days, in payment thereof. B, before due, indorses the note to C, an innocent purchaser for value. When due, A refuses to pay the note. What are C's rights?

17. A, at B's request, did certain work. Afterwards B, meeting A, promised to pay A $500.00 therefor. What are A's rights?

18. A agrees to act as manager of Y's store at a salary of $100.00 per month, for one year. B agrees to make certain goods for Y, to be paid for on delivery, to be sold in the store. Y sells out the store and all his rights under these contracts to X, X agreeing to carry out the same. A and B refuse to go on with their contracts. What are X's rights?

19. In an action for breach of a contract, defendant pleads that when he stated that he was willing to sell the property in question for $200.00 he meant and intended to say $225.00. Demurrer. Judgment for whom?

20. The laws of Ohio provide that no foreign life insurance company shall do business in this State without a license, and that an agent writing a policy for such company without license is liable to penalty. A, an agent for such company without license, writes a policy insuring B's life. Is the policy good—B having paid the premiums? If so, why?

21. In consideration of the delivery of a horse by A. to B and A's promise to pay B $50.00 a month for one year, B promises to carry the U. S. mail from Elyria to Cleveland for one year. At the end of the third month, A refuses to pay B the $50.00 and B then refuses to carry the mail longer. A sues B for breach of the contract. What, if any, defense has B to this action?

PARTNERSHIPS.

22. What is a limited partnership; how is it formed?

What is meant by a dormant partner, and what is his liability?

23. A partner, whose name does not appear in the firm name, withdraws from the firm; the business is to be continued by the remaining partners, as partners, using the old firm name. What, if

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anything, must be done by the withdrawing partner to avoid liability for contracts made by the new firm after his withdrawal?

24. A partnership is formed to continue, by express agreement in the articles of partnership, for three years. At the expiration of one year, all the partners being still alive, one partner gives notice to the others of the dissolution of the partnership. What, if anything, is the effect of this notice?

25. A and B are partners, doing business as A and B. A devotes all his time to the firm business, B devoting his time to other business; there is no agreement of any kind as to A having compensation for his services. The firm is dissolved by mutual agreement, and A winds up its affairs, disposing of its property and paying its debts; there is no agreement of any kind as to A having compensation for his services in winding up the firm. Can A recover the reasonable value of his services during the continuance of the firm's business? Why? Can A recover the reasonable value of his services in winding up the firm business? Why?

AGENCY.

26. (a) How may an agent be authorized to convey the real estate of his principal in Ohio?

(b) When once given how may such authority be revoked?

27. A, residing in Cincinnati has an agent in New York. He writes a letter revoking the agency and mails it at Cincinnati, directed to the agent's address in New York. When does the revocation take effect?

If the agent had written renouncing the agency when would the renunciation have taken effect? Give reasons.

28. An agent, acting under written instructions finds them ambiguous and equally capable of two different constructions. It being impossible to confer with his principal before acting he consults you as to his rights and duties under the circumstances. What advice would you give him?

29. A, a real estate broker, was employed by B to exchange certain city lots for farm property at an agreed commission. A arranged an exchange of the property with C, and the contract was closed and the deeds passed. A had also acted in the transaction as the agent of C. B refused to pay A his commissions and he brings suit for them. Can he recover under any circumstances, and if so, what facts must he show to entitle him to a recovery?

30. A has had an agent in a neighboring city for a number of years transacting his business under the powers of a general agent. Desiring to terminate the agency he consults you as to the steps necessary to be taken to guard his interests. What would you advise him to do?

31. A buys $1,000 worth of goods of B. B was, at the time, acting as the agent of C, but concealed the fact. The goods having been delivered C appears and sues for the price. At the time of the purchase B owed A a debt of $500. What rights, if any, has A as against C?

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Recent Cases.

CRIMINAL LAW—FLIGHT AS EVIDENCE.—In a prosecution for murder evidence was offered to show that the defendant fled immediately after the homicide. A charge that such flight is a slight circumstance tending to show guilt, which, if explained to the reasonable satisfaction of the jury, should not be considered against him, held not error.

Hudson v. State, 28 S. E. (1 Ga.), 1010.

DAMAGES—MENTAL ANGUISH.—Because of failure of defendant to deliver a telegram in due time plaintiff was unable to attend a funeral of a relative, which caused him to suffer "great mental anguish, disappointment and grief." Held, there could be no recovery.

Peay v. Western Union Tel. Co., 43 S. W. R. (Ark.), 965.

The court adopts the rule that for mental pain and anguish alone unaccompanied by physical injury, damages are not recoverable. "The intolerable and interminable litigation" a contrary doctrine would foster, convinces the court that the rule as enunciated in So Relle v. Telegraph Co., 55 Tex., 308, is wrong. The Texas rule, however, is followed by most of the southern states and Indiana and Iowa. It is also approved by Sedgwick in his work on Damages, as well as by Shearman and Redfield on Negligence. It would seem to be no more than just that in cases like the above, where the failure to deliver is of a matter of such an apparent personal nature, the Telegraph Co. should respond in more than nominal damages.

EVIDENCE — PRIVILEGED COMMUNICATION.—A clerk in a lawyer's office heard certain statements concerning the property of his employer's client. Held: Statements heard bv such employee were not privileged, where the witness was not a medium of communication between such party and his attorney.

Morton v. Smith, 44 S. W. R. (Tex.), 683.

EASEMENTS--WAY OF NECESSITY.—The owner of a lot bounded on one side by a highway and on the other by the ocean, sold half of the estate bordering on the highway to plaintiff, so that no access could be had to the unsold half except over the land of others or by way of the ocean. Held: There was no implied reservation of an easement over the part sold to the plaintiff.

Hildreth v. Grogins, 39 Atl. Rep. (Me.), 550.

The rule has always been that where an owner sells a part of his estate so that there is no access to the part unsold except over the part sold, there is an implied easement of way. The case above is undoubtedly a rigid application of the rule, the court holding that the ocean was really a public highway over which the defendant could gain access to his property. There was therefore not a case of strict necessity and no implied reservation of an easement. The rule relaxed, and it would seem justly so, in some of the states allows an implied reservation when the necessity is so strict that it would be unreasonable to suppose the parties intended the easement in question should not be used.

FELLOW-SERVANT RULE.—A brakeman was injured by the negligence of the conductor of the train on which he was employed. Held: They were not fellow servants, so as to preclude recovery from the company.

Walker v. Gillet, 52 Pac. (Kan.), 442.

The court dismisses this vexing question of fellow servants in few words. It cites and follows the case of R. R. Co. v. Ross, 112 U. S., 377, adding that if R. R. Co. v. Baugh, 149 U. S., 368, was intended to restrict the rule of the former they rejected the latter.

FREEDOM OF RIGHT OF CONTRACT—EIGHT-HOUR LAW.—A statute enacting that no person should require more than eight hours' work per day from any employee engaged in a mine or in smelting, reduction or refining of ores or metal. Held constitutional.

Holden v. Hardy, 18 Sup. Ct., 383.

The plaintiffs denied the constitutionality of the law on the ground of class legislation, and because it denied the freedom of right to contract. The court, without disapproving of the state decisions against eight-hour laws in general, supports the law as a health measure. It declares it to be

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a legitimate exercise of the police power in the restriction of contracts, which depends upon the degree of danger and harm to be avoided. Justices Brewer and Peckham dissented.

HUSBAND AND WIFE—ACTION FOR INDUCING HUSBAND TO DESERT WIFE. —Plaintiff sues to recover for wrongfully inducing of her husband to leave her. Held: She can recover.

Gernerd v. Gernerd, 39 Atl. (Pa.), 884.

It is merely giving the wife the same rights the husband has always had. She has been denied the right because of the common law unity of husband and wife. Now that she is recognized as having a separate legal existence, there should be no doubt as to her right. As the court says, there is no substantial difference as in the right which each has to the society and companionship of the other. Westlake v. Westlake, 34 O. S., 621. Maine, Wisconsin and Tennessee deny the right.

IMPUTED NEGLIGENCE.—Plaintiff, an infant, while on a wagon with his father, was injured by a collision with defendant's train, the parent being guilty of contributory negligence. Held: The father's negligence is not imputable to plaintiff so as to prevent his recovery for defendant's negligence.

Kowalski v. Chicago Ry. Co., 84 Fed. (Ia.), 586.

The court refuses to follow Thorogood v. Bryan, 8 C. B., 115, and the cases in this country based thereon. Although it holds itself bound to thus decide in accordance with the decisions in Iowa, it distinctly declares itself opposed to the doctrine of imputed negligence. Little v. Hackett, 116 U. S., 316.

INDEPENDENT CONTRACTOR — DANGEROUS PREMISES.—The defendant Ry. Co. owned property upon which an independent contractor exhibited a man without arms shooting at a target. Through the negligence of the contractor plaintiff was injured by being struck in the eye by a small piece of a bullet thrown off by the impact upon the target. Held: The railway company was liable to the plaintiff.

Thompson v. Lowell, etc., R. Co., 49 N. E. (Mass.), 913.

The court follows the recent case of Richmond R. Co. v. Moore, 27 S. E. (Va.), 70, in which the facts were very similar; the attraction being a balloon ascension in the Virginia case and plaintiff being injured by the falling of a pole used in inflating the balloon. The court in affirming the decision of the lower court says: The fact that the exhibition was provided and conducted by an independent contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator unless due precautions were taken to guard against harm.

LIFE INSURANCE—SUICIDE.—A policy was obtained on the life of a person, payable to himself, his executors, administrators or assigns, which was silent on the subject of suicide. Held: If the insured commits suicide when sane, policy becomes void.

Ritter v. Mutual Life Ins. Co., 18 Sup. Ct., 300.

The court bases its decision on two grounds, first because such an agreement must have been in the contemplation of the parties; second, because a contrary agreement would be against public policy. That the conclusion reached by the Supreme Court is natural and sensible would seem clear, though the rule is undoubtedly contrary in New York (Fitch v. Ins. Co., 59 N. Y., 557,) and a few other states. Clearly if the matter had been called to the attention of the company they would have refused to enter the agreement on any other condition. As to the second ground of the court's decision, there can be no doubt that a contrary agreement would be against public policy. It would prove a temptation and inducement to the insured to commit suicide in order to make provision for those dependent upon him.

As to the question of sanity, the court say that a person is sane at the time of taking his life when he is able to comprehend the wrongfulness of his act and to realize its full consequence to himself, his character, the members of his family and others, as fully as would a man of sound mind.

MARRIAGE—ANNULMENT FOR FRAUD—A man prior to his marriage represented to his prospective wife that he was in good physical health, knowing at the time that he was afflicted with a chronic and contagious venereal disease. On suit by the woman the contract was declared annulled.

Anonymous Case, 49 N. Y. Suppl., 331.

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The courts have never set aside a marriage contract because of misrepresentation, such as is ground for setting aside an ordinary contract. Although as the court in this case state, the law upon the subject of annulment of marriage for fraud is not clear, it seems settled that fraud sufficient to avoid a marriage must go to the very essence of the contract. 1 Bish. Mar. & Div., §183.

In the same court Wendel v. Wendel, 49 N. Y. Suppl., 375, a husband was granted annulment because of the incapacity of his wife to bear children, due to a surgical operation.

NEGLIGENCE--WORLD'S FAIR COMPANY—The French Republic sues for damage to its exhibits caused by a fire in the buildings of the Exposition Co. after the close of the exposition. Held: The company must use the highest intelligence and protection in guarding the exhibits of other nations, which duty continues until a reasonable time after the close of the exposition.

French Republic v. World's Columbian Exposition, 83 Fed., 109.

RECOVERY FOR MISTAKE OF LAW.—Defendant, receiver of a bank, a junior attaching creditor, was paid before the plaintiff's senior claim was paid, through a mistake of the sheriff. Held: Plaintiff could recover the money paid under a mistake of law, the defendant being an officer of the court.

Gillig v. Grant, 49 N. Y. Suppl., 78.

The court seem still to cling to the technical distinction between mistake of law and mistake of fact in permitting a recovery. The ground on which the court allows the recovery, although paid under mistake of law, is that enunciated in ex parte James, 9 Ch. App., 609, that the defendant, being an officer of the court, ought to "set an example to the world by being honest." It would seem that the mere fact that the receiver of the money was an officer of the court should make no difference. If it is inequitable that the defendant should retain it he should make restitution, no matter what position he may chance to occupy. The ground of the action is not that there has been a mistake, be it of law or fact, but that there has been a failure of consideration by reason of which the defendant has obtained something for nothing, which in æquo et bono he is bound to return. Claflen v. Godfrey, 21 Pick., 1. [A discussion of the right of recovery for a mistake of law will appear in the JOURNAL in the near future.—Ed.]

STREET RAILWAY—ADDITIONAL BURDEN.—A street railway company operating along the highway of a country town graded the same with permission of authorities for its own convenience to the injury of abutting proprietors. Held: An abutting proprietor may obtain damages for such injury.

Zehren v. Milwaukee, etc., Co., 74 N. W. (Wis.), 538.

The court in this case had before it a comparatively new question. It has always been held that a street railway imposes no additional burden upon the right of way, in a city. The court, however, was dealing with an interurban street railway and it would seem to have come to a just conclusion. The urban street railway, by reason of its operation, relieves the road of travel by substituting one vehicle for another. The interurban railway on a country highway burdens the road with travel which would otherwise fall to the steam railroad. It subserves an entirely different purpose from that of the city street railway. It transports passengers and freight from one city to another, running along these country highways, which receive very little, if any, benefit. The interurban railway of today, with its large coaches, with separate apartments for baggage, comes indeed so close to serving the same purpose as the steam railroad that it should be treated accordingly in the courts. Penn. R. Co. v. Montgomery Co., 167 Pa. St., 62.

TRIAL--FAILURE TO PRODUCE WITNESSES.—In a suit for personal injuries, the evidence as to the company's negligence was conflicting. The company failed to place on the stand an employee who was present at the time the injuries were sustained. Held: That it was legitimate for the plaintiff's counsel to argue to the jury that this was a circumstance from which an inference could be drawn that if this employee had been examined he would have testified to facts prejudicial to the defendant.

Western & A. R. Co. v. Morrison, 29 S. E. (1 Ga.), 104.

The court goes upon the ground that the arguments of counsel should not be too greatly restricted, and the court should interfere only in cases of clear abuse of discretion and serious damage to the party complaining, not as in this case when the reasoning of counsel is unsound merely.

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Simmons, C. J., dissents, in an elaborate opinion, contending that it is the privilege of a party to rest his case upon such evidence as he may deem proper and expedient to offer; that no unfavorable inference can arise against a party so long as he is acting strictly within his legal rights.

Ohio Digest.

Administrator. Where estate owns a chattel mortgage, administrator cannot buy mortgaged property and bind estate by his promise to pay purchase price; judgment recovered against administrator in action on such promise will bind him personally, but not the estate. 15 C. C., 261.

Animals. All who take part in harboring a vicious animal are jointly liable. One is chargeable with knowledge of such vicious habits of the animal as must have become known had he exercised reasonable care and watchfulness. 15 C. C., 300.

Appeal. Order of probate court confirming a sale by assignees in insolvency in opposition to unsecured creditors is a final order and so affects property rights that appeal will lie. 5 O. N. P., 145.

In determining the time allowed for bills of exception, the journal entry as to date of overruling motion for new trial governs. 8 O. C. D., 127.

Beneficial Association. Member of an association organized under §3636, R. S., cannot change beneficiary except as pointed out by by-laws of the association. 39 B., 157.

Building Associations. Where constitution provides that withdrawal claims be paid in order of filing, a mortgagor, who has purchased from another member his withdrawal claim not yet payable, cannot tender such claim to association in cancellation of mortgage debt. 5 O. N. P., 133.

Carrier. Consignor may sue carrier for breach of contract of carriage, although he retains no property in the goods. 5 O. N. P., 146.

Circuit Court. Two judges constitute a quorum; but if divided in opinion as to effect of evidence upon trial of issues of fact, a valid final judgment cannot be rendered. 39 B., 164.

Contempt. One may not be imprisoned for contempt of court for failure to pay alimony who, through lack of property and earning capacity, is unable to comply with order. 15 C. C., 246.

Contracts. An instrument acknowledging settlement and payment of all claims, signed by one receiving payment, is not a mere receipt, but a written contract and cannot be varied by parol evidence. 39 B., 167.

Written contract read to one who cannot read and assented to by such one, cannot be set aside on the ground that confidence was reposed in party reading and the contract was not weighed or fully understood. 39 B., 177.

In action for breach of contract to deliver goods, difference between the contract price and market price may be recovered without averment or evidence of special injury. 39 B., 197.

Constitutional Law. Act (90 O. L., 166,) authorizing county commissioners to issue bonds for erection of an armory for use of National Guard is void. 39 B., 165.

"Act to authorize the commissioners of Hamilton county to improve Michigan and Shaw avenues" held unconstitutional. 5 O. N. P., 123.

"Smoke ordinance" passed by city of Cleveland is unconstitutional and void because indefinite, uncertain and vague, and not within authority of council. 7 O. D., 124.

Corporations. Action to collect unpaid subscriptions to capital stock, instituted by a receiver, is a suit at law for a money judgment; there cannot be joined as defendants in such action all delinquent stockholders, both resident and non-resident in the county. 39 B., 199.

Club incorporated for pleasure has inherent right to expel one of its members after giving such member a hearing and opportunity for defense. Proper remedy for one illegally expelled is by injunction. 5 O. N. P., 139.

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County Commissioners. A contract, whereby the commissioners surrender a portion of highway for uses of a suburban railway and railway agrees to purchase enough more land to construct road alongside its track, is within authority of the commissioners. 15 C. C., 242.

Dow Tax. Lien for, is superior to prior mortgage liens for the amount of tax only which the act in force called for at time mortgage was created. 5 O. N. P., 162.

Evidence. Where a witness on his examination-in-chief has testified that a dog is good-natured and peaceable, upon cross-examination counsel may ask hypothetical questions to determine what witness understands by such terms. 15 C. C., 300.

Execution. In proceedings in aid of execution against superintendent of county infirmary, seeking to seize his wages, the county has a right to withhold so much of such salary as is necessary to pay the taxes of the superintendent and is not required to resort to tax lien. 5 O. N. P., 155.

Wages earned within three months by one who is head of a family are personal earnings and exempt from execution. A watch and chain of reasonable value are exempt from execution as wearing apparel. 5 O. N. P., 155.

Husband and Wife. When husband and wife are jointly and severally liable on a note, action may be brought against wife alone without joining husband; no recovery can be had against wife unless it appear that she has separate property to be charged therewith. 7 O. D., 129.

Injunction. Injunction granted to prevent erection of blacksmith shop near a dwelling house held premature and erroneous. 15 C. C., 228.

Injunction will be granted to prevent one tradesman from using symbols, devices and advertisements peculiar to another business house or by any other means representing his business as that of another. 15 C. C., 224; 5 O. N. P., 120.

Injunction will not lie at the suit of a claimant to public office who is out of possession against an adverse claimant who is in possession. 57 O. S. A., 372.

Insurance. If company pays insured for a loss which has occurred through fault or negligence of a third party, it will be subrogated to the rights of the insured against such third party. 15 C. C., 355.

Company is not liable for premiums paid on a void policy issued by an agent under false representations. 8 O. C. D., 116.

Where policy contains no condition of forfeiture for non-payment of premiums, the payment of first premium is a condition precedent to validity of policy, but subsequent non-payment does not cause forfeiture unless company gives notice of its election to treat non-payment as forfeiture. 7 O. D., 118.

Joint Liability. In an action against several defendants on a joint liability, a judgment against one joint defendant by default before determination of the case is erroneous. 15 C. C., 224.

Lease. Tenant under a lease for one year holding over becomes tenant from year to year; if such tenant leaves during year and claims right to do so without liability for rent, he must, to show surrender by parol, prove a surrender in fact of premises, a delivery of possession to landlord accepted by him as surrender. 15 C. C., 233.

Mechanics' Lien. A vendor in another state, selling and delivering goods there to a contractor, who transports them to this state for use, is entitled to mechanics' lien under laws of this state. 39 B., 192.

Mining. A conveyance of mining right in land, which included right to coal, iron ore, and "other valuable minerals," held not to include right to petroleum oil or natural gas afterwards discovered on land. 39 B., 187.

Mistake. Where, by mistake of auditor, the value of a new building is added to appraisement of property, which value had already been embraced in valuation of such property made by Board of Equalization, held to be a clerical error and owner entitled to refunder of taxes. 15 C. C., 279.

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Mortgages By a deed of general assignment, mortgaged property passes into jurisdiction of court of insolvency notwithstanding the pendency of foreclosure proceedings. 5 O. N. P., 119.

Mortgagee permitting mortgaged property to go into the venture of a continuance of the business by a receiver, if property is consumed in the venture, must abide by the result. 7 O. D., 133.

Municipal Corporations. City ordinance of Cincinnati providing that all connections of sewer with house drainage must be made by licensed plumber, held void because in excess of power of board of legislation. 5 O. N. P., 122.

City must give notice of resolution for street improvement to property owner, in order to obtain jurisdiction to make improvements. 15 C. C., 357.

Negligence In action for injury by defective machinery, want of knowledge of defect by employee is essential to a recovery. 15 C. C., 254.

Negotiable Instruments. In an action on a note, where defense is illegality as to part of consideration and judgment is taken on part admitted to be legal and case dismissed by plaintiff as to balance, suit for such balance is not maintainable in another action, the former judgment being a complete bar. 12 C. C., 290.

New Trial. In computing the three days' time allowed for filing motion for a new trial, Sunday is not excluded. 8 O. C. D., 113.

Officer. One in possession of an office may be removed only through an action of quo warranto and will be protected by injunction from forcible expulsion. 7 O. D., 113.

Oil and Gas Lease. Provision in lease that four wells be completed in second year—two in first six months and two in last six months, and that on default 22 acres of grant be forfeited; held that completion of four wells at any time during second year amounted to substantial performance and that stipulation as to forfeiture was void for indefiniteness. 15 C. C., 294.

Partnership. Judgment confessed against firm by one partner cannot be impeached by creditors of firm. 39 B., 203.

Pleading. Where petition is dismissed for failure to state cause of action, appeal will not lie. 15 C. C., 204.

Prison Labor. Courts will not interfere by injunction to restrain city from contracting to let convict labor to a corporation. 5 O. N. P., 165.

Quo Warranto. Act of a member of Board of Supervisors of Cincinnati in allowing a tax return to go on the tax duplicate though knowing it too low in amount, held not to constitute such neglect of duty or misconduct as to warrant his removal. 15 C. C., 333.

Receiver. One appointed in a proper case by court of one county may not be discharged on mere motion by such court and ordered to turn over assets to an assignee subsequently appointed by court of another county, before case has been heard on its merits. 15 C. C., 232.

Sidewalks. City property owner is liable if he constructs a vault under sidewalk and defectively covers it, although the city is independently liable for omission to keep street in repair. 57 O. S. A., 330.

Statutes Act of 1890 regarding burden of proof in personal injury cases applies to injuries sustained before act was passed, in suits brought after its passage. 15 C. C., 254.

Stoppage In Transitu. Where an insolvent vendee sells goods in transitu to carrier in payment of pre-existing debt, carrier is not a purchaser for value and right of stoppage remains in vendor. 15 C. C., 288.

Subrogation. A purchaser of chattels from a mortgagee will be subrogated to all the rights of such mortgagee as against a subsequent mortgagee seeking to recover property. 15 C. C., 343.

Turnpike. Where injunction is asked to prevent a railroad from building a low bridge over turnpike and it appears that much work has been done on bridge, and that a heavy expense may be avoided by a lowering of pike, court will order that latter be done at expense of railroad. 15 C. C., 268.

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Wills. Parol evidence admissible when any part of will is ambiguous. In a doubtful case that construction of a will prevails which does not involve the devise of property not owned by testator. 39 Bull., 157.

Charitable bequest, if discretionary power is vested anywhere to select particular beneficiary and if objects intended can be ascertained, will be upheld. 5 O. N. P., 149.

Devise to "children" who are dead at time of making the will, does not fail, but stands for benefit of surviving issue of such children. 5 O. N. P., 147.

Book Reviews.

Handbook of the Law of Equity Pleading, by Benjamin J. Shipman, West Publishing Co., St. Paul, Minn.

This book was received some time ago. A cursory perusal enables us to say that it is worthy of a place in the celebrated Hornbook Series. Owing to the importance of the subject of which it treats it has been thought best to defer an extended review until the October number, before which time a thorough examination of the book will have been completed.

SELECTED CASES IN THE LAW OF PARTNERSHIP. — By Professor Francis M. Burdick, Columbia University of Law. Little, Brown & Co., Boston, Mass.

This latest volume of cases published by Little, Brown & Co. to accompany their splendid Student Series of Text-Books, is a selection of important cases on a difficult and complex subject. The 688 pages are divided into nine chapters, which logically analyze the subject, so that the student is enabled to study it to the best advantage. A separate chapter of eighty pages on "Limited Partnership" adds to the value of the book, which cannot fail to be of great assistance to the student and professor of law.

MAGAZINE NOTICES.

Harvard Law Review—May—Jurisdiction over Foreign Corporations, E. Q. Keasby; The Element of Chance in Land Title, H. W. Chaplin; Contributory Infringement of Patent Rights, O. B. Roberts.

Yale Record—May—The Bar of the City of New York, Geo. M. Curtis; The National Idea, Talcott H. Russell; Contract Exempting Employers from Liability for Negligence, George E. Beers.

American Law Register—May—Interference with Contract Relations, Earnest W. Huffcut; Partnership Property, G. W. Pepper.

Green Bag—May—Judges and their Environment, H. C. Merwin.

Albany Law Journal—April 30—Right of U. S. to Intervene in Cuba, W. W. MacFarland. May 7—The Graded Inheritance Tax, R. L. Edwards; The Law and Practice of Lis Pendens, Major H. C. Whitney.

The Legal Counselor—May—Unwisdom of the Common Law; Liability of a Guarantor.

Canada Law Journal—Employers Liability to Servants, C. B. Sabaet.

Chautauquan—June—Employers and Workmen's Liability Laws, Pasquale Villari.

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THE

Western Reserve Law Journal

Vol. IV OCTOBER, 1898 No. 5

Should the "Scintilla Rule" be Abolished?

By the "scintilla rule" is meant the rule which, in jury trials, requires that the case be submitted to the jury, "if there is any evidence tending to prove each material fact put in issue, and indispensable to a recovery."

Dick vs. R. R. Co., 38 O. St. 389.
R. R. Co. vs. Murphy, 50 O. St. 142.

In other words, it is a rule of practice which makes it error for the trial judge to pass upon the sufficiency of the evidence until after verdict. The rule no longer obtains in England, nor in the Federal courts of this country, nor in a large majority of the state courts. So far as the writer has been able to ascertain, North Carolina and Ohio are the only states in which it still obtains. The fact that a great and progressive commonwealth like our own differs from nearly all others in so important a rule of practice is sufficient excuse for inquiry as to the correctness of its position.

The rule was first announced in Ohio in 1832 in the case of Williams vs. Burnet, Wright's Repts. 53, in which it is said "A non suit will not be ordered where there is any evidence tending to prove the plaintiff's case." The supreme court has at intervals since then declared in favor of the rule, its latest deliverance on the subject, so far as the writer is aware, being the case of Ry. Co. vs. Snell, 54 O. St. 197, 201. In only one of ten cases in which it has been announced is there any discussion of the reason or foundation of the rule. This exception is the case of Ellis vs. Trust Co., 4 O. St. 628, 646, in which Judge Ranney briefly discusses the matter. He denies the power of the court to direct a verdict if there is any evidence, "no matter how slight," tending to prove each material fact in controversy. He bases his denial upon the constitutional guaranty of the right of trial by jury. He does not deny the power of the court, nor the propriety of exercising the power, to set aside a verdict which is not sustained by sufficient evi-

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dence. On the contrary, he approves it. Yet, the one would seem to be as much a violation of constitutional prerogative as the other. Judge Ranney anticipates this suggestion and answers it by saying that the two proceedings (directing a verdict and setting aside a verdict) have nothing in common. He says "the one reviews the evidence, but not until the functions of the jury have been discharged, and then only for the purpose of determining whether the cause should be submitted to another jury. The other takes the evidence from the jury, prevents a verdict and disposes of the case."

With all due respect to the great learning and ability of Judge Ranney, it may be suggested that the two proceedings have one very important thing in common. They have a common object, which is to prevent the rendering of an unjust judgment. He concedes, as every one does, the right and the duty of the trial judge to set aside a verdict which in his opinion is not sustained by sufficient evidence. But he denies the right of the judge to say to the jury, "The evidence is so grossly insufficient that a verdict for the party who introduced it could not stand and therefore ought not to be returned." In other words, he deems it the duty of the court to right a wrong verdict by setting it aside, but contrary to its duty and beyond its power to prevent a wrong verdict being returned. And why? Because, it is said, the party who introduced the evidence has a constitutional right to have the jury pass upon its sufficiency. Let us examine the proposition for a moment. The language of the constitution is "*The right of trial by jury shall be inviolate.*" Bouvier, in his Law Dictionary, says trial by jury is "that form of trial in which the facts are determined by twelve men impartially selected from the body of the county."

It follows, from this definition, that the right which is to be inviolate is the right to have the facts determined by a jury. This means more than merely submitting the facts to a jury. It means that the verdict shall be inviolate and a judgment entered in accordance with it, provided, of course, that there was no error in the trial and that the verdict is sustained by sufficient evidence. Otherwise the right to trial by jury is of no value and the declaration of the constitution is vain. But no one claims that a verdict should be held inviolate which is supported by a mere scintilla of evidence. All concede that it must have a substantial support or be set aside. It is also conceded that the trial judge must pass upon the sufficiency of the support. If he may, without violating the constitution, pass upon it after verdict and violate the finding of a jury by setting it aside, how is the constitution violated by passing upon it beforehand and preventing that sort of a verdict from being returned? One might as well say that a supervising architect, whose duty it is to pass upon the sufficiency of the foundation of a building, must reserve his judgment until the building is completed.

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If, however, the formal rendering of a verdict is necessary to, and will, satisfy the constitution, the court may say to the jury, "This evidence is so clearly insufficient that the law will not permit a verdict in favor of the party introducing it to stand, and therefore you should not render such a verdict." This is all that the opponents of the scintilla rule contend for. Such a course does not "take the evidence from the jury, prevent a verdict and dispose of the case." It still leaves it with the jury under such instructions as, if followed, will prevent the jury from doing a vain thing. It merely says to the jury, "This evidence being a mere scintilla, is insufficient in law to sustain a verdict." Such a course is a practical application of the maxim "de minimis non curat lex." In Ohio, at least, such a course cannot result in any irremediable injury to the defeated party. He is entitled to have the weight of his evidence passed upon by the circuit court. If, in the opinion of that court, the evidence amounted to more than a scintilla, the judgment of the lower court would be reversed and a new trial ordered.

The acknowledged function of the judge who presides in a jury trial is to guide and direct the proceedings, to the end that the law shall be administered and justice done between litigants. It is conceded that this function extends to setting aside a wrong verdict. If a wrong verdict may be set aside, on what ground, constitutional or otherwise, may it not be prevented? To right a wrong is well; to prevent it is better. Judge Ranney in the case above referred to (p. 647) says it may not be prevented because a non suit "puts the plaintiff out of court, whereas a new trial leaves him in court." Grant it. If he ought to go out of court, the sooner and easier he gets out the better for himself and all concerned. The longer he remains in, the worse he and they are off. But the fact that he goes out of court, if true, has no argumentative force. Suppose he is permitted to have a verdict which is not supported by sufficient evidence, and suppose the trial judge refuses to set it aside and renders judgment on it. In that case the other party goes out of court. In the former case the right party is sent out and in the latter case the wrong party is sent out. But in neither case, as already suggested, is the party without a remedy, for the circuit court is authorized to pass on the weight of the evidence. So much on the constitutional question from the standpoint of reason. Let us for a moment consider it from the standpoint of authority.

The right of trial by jury is as strongly guarded by the constitution of the United States (Art. 7) as by the constitution of Ohio (Art. 1, Sec. 5). Yet the scintilla rule receives no recognition in any federal court. Justice Miller in Pleasants vs. Fant, 22 Wall. 116, says:

"It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other

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violation of his lawful rights in the conduct of a trial. * * * In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force, which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony, in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict should be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In the constitution of nearly every state the right of trial by jury is as carefully guarded as in Ohio. In many of the state constitutions the language is the same as in the constitution of Ohio. Yet in nearly all of them the scintilla rule has never obtained, or has been abrogated. The ablest text writers also disapprove of the rule. Judge Cooley in his work on Torts, 2nd Ed. p. 804, says:

"If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary he should say to them, 'In the judgment of the law this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence or the want of it as one of law."

Shall we say that the courts of all these states are violating their constitutions and that so eminent a writer on constitutional law as Judge Cooley is advocating a disregard of a constituional right? Does it not rather appear that the constitutional argument in favor of the scintilla rule is contrary to both reason and authority?

In Ohio, the doctrine of "*stare decisis*" has been urged in support of the rule. The doctrine has some force when a decision or line of decisions has become a recognized rule of property. It can have no force when applied to a mere rule of practice, if there are substantial reasons for changing the rule. Medo-Persian stability is, fortunately, not a characteristic of decisions of courts of last resort. If it were, we would have no over-ruled cases and jurisprudence would be a less progressive science than it is.

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Having examined the arguments in favor of the rule, let us briefly consider some of the practical reasons why it should be abrogated.

1. Nothing is or can be gained by adhering to it. As already suggested, a party gains nothing by having a verdict in his favor upon evidence so slight that no right minded judge would or could permit it to stand. It is better for both parties that the court end the controversy by directing a verdict which will accord with the law and the evidence, than to permit a verdict to be returned which cannot be sustained.

2. The application of the rule is pernicious in its practical results. What judge or lawyer, presiding or practicing where it obtains, has not had observation or experience, or both, of cases which have occupied the courts for months and even years in a continuous see-sawing between judge and jury; the latter returning and the former setting aside verdict after verdict? Under the application of the scintilla rule it not infrequently occurs that a defendant is compelled to "buy peace" of the plaintiff in a case which has no merit and which a court, properly administering the law, would never permit to pass into judgment against him.

Furthermore, the rule not only tends to protract litigation, but adds materially to the expense of it, both to the public and to litigants. The jury must be paid twenty-four dollars per day by the tax payers. Clerks, sheriffs and witnesses must be paid by the party who is eventually defeated, if he is solvent, and attorneys must be paid by both parties. Besides this, the time of the courts is occupied with repeated trials of cases which have no merit while important cases must wait.

3. On the other hand no injustice can be done by discarding the rule. w

A plaintiff can always have the sufficiency of his evidence passed upon by the circuit court, and a new trial awarded if that court should be of the opinion that the evidence would sustain a verdict. Such a proceeding would have reason for its foundation and justice for its results; whereas the scintilla rule is liable at any time to lead to a practical absurdity. For example: The trial judge directs a verdict for defendant and enters judgment accordingly. The circuit court, on proceedings in error, reverses the judgment because it has discovered a scintilla of evidence in support of plaintiff's claim. A new trial is had, resulting in a verdict and judgment for plaintiff. The circuit court, on error, again reverses the judgment because it has again discovered only a scintilla. Or, take another example: The trial results in a verdict and judgment for plaintiff. The circuit court reverses the judgment because it is not sustained by sufficient evidence. A new trial is had in which the same evidence is given and the trial judge directs a verdict and enters judgment for defendant. Under the scintilla rule the

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circuit court must again reverse the judgment because there was some evidence tending to support the plaintiff's claim, although insufficient to sustain it. The practical effect of all this—the result of adhering to the "scintilla rule"—is to set at defiance the inalienable right of litigants to have not only a speedy trial, but a speedy *termination* of the controversy.

This sort of farce, liable at any time to result from applying the scintilla rule, tends to bring the courts into disrepute. It would seem that, from the standpoint of both justice and expediency, the rule ought to be abrogated.

Bowling Green, O. JAMES TROUP.

Status of Married Woman at the Common Law.

III.—CONCLUSION.

Having discussed some of the advantages which came to the husband on marriage, let us endeavor to ascertain whether or not there were any disadvantages resulting to the husband from marriage. 1.

I.—As to debts and other obligations incurred by the wife prior to the marriage.

It was a well-established rule of the common law that the husband was liable for all debts and other obligations incurred by the wife before marriage, and this was true even though the wife did not bring her husband a single cent's worth of property, and it was likewise true even though the wife had concealed from her husband the fact that she owed any debts, and he married her under the impression that she was free from all debts and obligations. It mattered not how large or how small these obligations were.

He was liable for all wrongs committed by his wife before marriage. If she had assaulted or imprisoned, or slandered or libelled anyone before her marriage, her husband was obliged to make compensation for her wrong to the injured party. If she had trespassed upon property, or had converted another's personal property to her own use, or had defrauded another out of property—in all these cases the husband was obliged to compensate the injured party even though he was ignorant of all these facts at the time of marriage, and even though his wife brought him not a single cent's worth of property. Kent II, 143 1 Bl. Com., 443.

But this obligation of the husband to pay his wife's ante-nuptial debts and obligations lasted only during coverture, and the wife's creditors must make haste to collect their claims before the marriage relation was dissolved either by death or by law. It made no difference that these creditors had begun legal proceedings before the marriage

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relation was dissolved unless they had actually received judgment. A case might very easily be imagined where the creditor had brought legal proceedings, the case had been tried, the jury had returned a verdict and the wife died before the court formally gave judgment for the creditor. In that case the creditor could not collect the judgment from the husband, even though the wife's death was not known to have taken place until after the judgment was given. The creditor got no claim against the husband personally until judgment was actually given by the court, and unless the creditor collected the claim from the husband, or converted the claim into a judgment before the wife's death, the creditor had no further claim against the husband.

This advantage was given to the husband even though his wife brought him a large estate, a large part of which he still had at the time of her death. In the year 1735 a case was tried in England wherein a wife at the time of marriage brought to her husband £700 and was indebted in the sum of £50. The wife died soon after the marriage and before the creditor had recovered judgment against the husband. The creditor asked the Court of Chancery to compel the husband to apply a part of the £700 formerly belonging to the wife to the payment of this claim, but the Lord Chancellor held that the law was so well settled that a husband was not liable for his wife's ante-nuptial debts after her death, that nothing but an act of Parliament could change that law. Heard vs. Stamford, 3 P. Williams, 409, (1735) See also Woodman vs. Chapman, Widow, 1 Campbell, 189, (1808).

On the other hand, if the wife survived her husband, her ante-nuptial debts survived to her.

II.—As to wrong's committed by the wife during marriage.

The husband was also liable for wrongs committed by his wife during marriage. Stroop vs. Swarts, 12 S. & R., 76, (1824). And this was true even though husband and wife were not living together at the time the wife committed the wrong. In 1833, a case was tried in England in which a husband was sued for a libel committed by his wife, although they had been living apart ten years, and although the libel was committed while they were living apart, but he was nevertheless held liable for this wrong committed by his wife. Head vs. Briscoe, 5 C. & B., 484, (1833). And in the year 1874 the Supreme Court of Ohio held that the husband was liable not only for the actual damage suffered for the wife's slander, but that he was also liable for exemplary or punitive damages. Fowler vs. Chichester, 26 O. S., 9, (1874).

The reason given in some of the cases for this liability on the part of the husband is that as a husband has a right to chastise his wife he must restrain her from committing such wrongs, and if he allows her to commit such wrongs then it is no more than just that he should make compensation for such wrongs.

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III.—As to the hucband's liability for the wife's necessaries.

The rule of common law is well settled that a husband was compelled to supply his wife with necessaries, and if he refused to supply such necessaries she could pledge his credit for the same, and the shopkeeper or other persons who supplied her with such necessaries could compel him to pay for them. 1 Bl. Com., 442; 11 Kent Com., 146.

It was easy enough to enunciate this rule of law, but it was an exceedingly difficult matter for the court to determine what constituted a wife's necessaries. The court finally relieved themselves of the difficulty very largely by leaving it to a jury of twelve men to decide whether or not in a given case the articles in question were really the essary to the wife of a man in the rank and position of the man against whom the action was brought. It is therefore impossible to lay down any definite rule as to what constitute the necessaries of married women, because no two juries will agree on that question; but we can be pretty sure of one fact, that if a poor shopkeeper sues a man of property for goods furnished the latter's wife, the jury is very likely to decide that those goods were necessary, however extravagant the wife might be in fact.

A few examples may serve to give some notion of what juries have considered to be necessaries.

In the year 1694 an action was brought against a lawyer for certain articles furnished to his wife. The lawyer and his wife had been living apart for two years, and a short time before the suit in question was brought, the wife told her husband that she would run him in debt in one term of court to the extent of £500, and would have him in jail in the next term of court for failure to pay his debts. She thereupon purchased from the plaintiff in the case some silver fringe and lace of the value of £94, which she used on a side saddle and in her clothing; she also made a number of large purchases on her husband's credit; and in the meantime her husband had given her £50 a year for clothing. The court instructed the jury that if they found that these goods were suitable for the defendant's wife, they should render a verdict for the plaintiff. The reporter tells us that, "Under this directionfi the jury, being of gentlemen, found generally for the plaintiff, for his whole damage." Morton vs. Withers, Skinner, 348, (1694).

In 1807 a man was sued for £34 worth of dress goods sold to his wife. The defendant was a man of very moderate means, but his wife, in order to obtain credit from the shopkeeper, came to the plaintiff's store with a carriage and footman and pretended to be the wife of a very wealthy man. The storekeeper, without making any inquiry as to her identity, let her have the goods and then sued her husband. The court told the jury that, however low a man's circumstances may be, if he allows his wife to assume an appearance which he is unable to

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support, he is answerable for the consequences when a tradesman is thereby deceived. Although there was no evidence in the case whatever, that the husband knew anything of his wife's conduct, and altho' he was a man of very limited means, the jury still gave a verdict against him for the full amount of £34. Waithman vs. Wakefield, 1 Camp., 120, (1807).

In 1824 an action was brought against an eminent lawyer by a certain jeweler to recover the sum of £83, being the value of certain diamond rings, necklaces, bracelets and other kinds of jewelry sold to the defendant's wife. Defendant had never seen the jewelry, but it seems that the wife had disposed of the jewelry to raise money. The court left it to the jury to decide whether or not these were necessaries, and told them to consider whether or not the articles were suitable to the estate and degree of the defendant's wife. The jury found that they were, and gave a verdict for the plaintiff. Montague vs. Espinasse, 1 C. & P., 356, (1824).

In 1828 another lawyer was sued by a milliner to recover £28, being the value of certain millinery sold to the lawyer's wife in one day. The jury found that these articles were necessaries and gave a verdict for the milliner. Seaton vs. Benedict, 5 Bing., 28, (1828).

In 1834 an action was brought against an army officer to recover £31, being the value of certain wines furnished the defendant's wife during his absence in India. The jury thought that these were not necessaries. Dennys vs. Sargent, 6 C. & B., 419, (1834).

In 1838 an action was brought against a man for £142, being charges for ten month's livery hire furnished defendant's wife, who was not living with defendant. Defendant was a man of moderate means, and the jury found that these were not necessaries for the wife. Emmet vs. Norton, 8 C. & O., 506, (1838).

In 1840 an action was brought against a clergyman to recover £700, being the value of certain fancy birds sold to the clergyman's wife. The jury found that these were not necessaries, and gave the verdict for the defendant. Freestone vs. Butcher, 9 C. & P., 647, (1840).

In 1844 an action was brought against a man to recover £5,287 for certain millinery sold to his wife during a short period of time. The judge was so horrified by the amount, and apparently knowing the weakness of juries, he refused to leave it to the discretion of the jury, but ordered them to bring in a verdict for the defendant. Lane vs. Quonmonger, 13 M. & W., 368, (1844).

In 1862 an action was brought against a man for the expenses of his wife's funeral The wife, without any cause therefor left her husband ten years before her death and went to live with her brother. She remained there till her death. Her brother buried her without consulting the husband, and then sued for funeral expenses. The court

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held, as a matter of law, that the husband was liable for the expenses.

That a wife's necessaries were not restricted to food and raiment is shown by a Pennsylvania case, where it was left to the jury to decide whether or not a piano was included in the list of the wife's necessaries. Parke vs. Cleaver, 37 Penn. State, 251, (1860).

In 1859 a case arose in New Hampshire in which it appeared that a man had assaulted his wife, and she employed an attorney to bring criminal proceedings against her husband. Through the activity of this attorney the husband was arrested for a breach of the peace, convicted and imprisoned, and when he regained his liberty this same attorney sued him for services performed in securing his arrest and conviction. The court held that these attorney's fees were among the wife's necessaries. Morris vs. Palmer, 49 N. H., 132, (1859).

A similar case was tried in England in 1813 and decided the same way. Shepherd vs. Mackoul, 3 Camp., 326, (1813).

But not only is a wife allowed to pledge her husband's credit for attorney's fees to prosecute him criminally, she was also entitled to pledge his credit for attorney's fees in securing a divorce from him. Brown vs. Ackroyd, 5 E. & B., 825, (1856).

In a case brought up in Iowa in 1874 it appeared that a husband had endeavored to secure a divorce from his wife. The wife employed an attorney to defend her and succeeded in defeating her husband in his attempt to secure a divorce. Her attorney's fees were quite heavy but her attorneys compelled her husband to pay them. Proter vs. Briggs, 38 Ia., 166, (1874).

Not the least hardships that fell upon the husband was the rule of criminal law that if the wife committed a crime in the presence of her husband she was conclusively presumed to have acted under his coercion, and she was acquitted while he was punished. Rex vs. Knight, 1 C. & P., 116, (1822). The courts even went so far as to rule that even though the husband was compelled by his wife to aid in the commission of a crime, the husband should be punished but the wife should be acquitted. About the year 1820 a case was tried in Engand in which a husband and wife were indicted for highway robbery. It was conclusively proved that the wife coerced her husband into assisting her to commit the robbery, but she was acquitted, while her husband was hanged. 1 C. & P., 116, N.

In another case one Paddy Brown's wife was indicted for carrying implements to her husband who was in jail to enable her to break jail. The court held that even though her husband was confined in jail, still she was presumed to have acted under the coercion of her husband and was acquitted.

Cleveland, O. E. H. HOPKINS.

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Necessity of Law School Training.*

Observation shows that, under modern conditions existing in the profession, an education in law cannot be procured exclusively in a law office, and that those who have had the benefit of a law-school training are better equipped to enter upon their career and are more likely to succeed therein than those who come to the bar through an office. The reasons for this are many and obvious. The law clerk of to-day has not the advantages or opportunities of his predecessor of even twenty years ago. The methods of office work have been revolutionized in that time. How many lawyers with students in their offices know or care what the latter are reading or if they study at all? Their reading was not directed in their student days, and they see no reason why that of the present aspirants should be, forgetting entirely the differences in existing conditions at the bar, and the vast number of better equipped competitors with his clerk that the law schools are yearly turning out. Those who seek admission to the bar through an office are not properly treated by the men who morally assume the responsibility of their legal education. The law clerks are being unjustly and improperly neglected by their employers, and it is for them that I make this plea to-day.

The chances are equal, if the lawyer cared, that he would not know how to direct or construct a well-considered and progressive course of law reading covering a period of two years or more; so, beyond telling him to commence on Blackstone (through many obsolete pages of which his clerk will unnecessarily wade), and then to read Kent, he lets him proceed at his sweet will and pleasure, to the destruction of all method, the waste of much valuable time and the consequent loss of much needed knowledge.

Members of the bar of the future, to succeed, must have a scientific, well-directed and comprehensive training in a law school. The fact that many of the lawyers of to-day did not have that advantage, and still succeeded, is no reason why the future will not demand it. There is so much to be studied, and so much more that can not be studied for want of time; there are so many books that must be read, and so many more that can be dispensed with; there are so many cases to be considered, rules to learn and exceptions to know, that unless the law student puts himself under the guidance of some one learned in the art of directing law study, he will float at the mercy of every varying wind and tide upon an ocean of knowledge, without rudder or compass, and become unfit to make the voyage of life in his chosen profession.

From a paper entitled "Two years' Experience of the New York State Board of Law Examiners," read by Austen G. Fox, Esq., a member of the Board, at Saratoga, August 21, 1896, before the section on Legal Education of the American Bar Association, I take the following facts, compiled from the records of the State Board: "Of 1,050 applicants examined up to August 1, 1896, 793 had law-school training, and 257 had only experience in an office; of the 793 who attended law

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Extract from report of Franklin A. Danaher, Esq., to New York State Bar Association.

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schools, 116, or about 14 per cent., failed to pass one or more times; of the 257 who had not attended a law school, 68, or about 26 per cent., failed to pass one or more times."

We will not add testimonies to prove the truth of the necessity of regular, systematic, well-considered and directed training in a professional school for the future applicants for the honors and emoluments of the bar, and its superiority over all other known methods of study. The subject has passed beyond the line of discussion and is now in the domain of established facts.

Supreme Court Bar Examination, June, 1898.

LEGAL ETHICS.

32. A is defending a prisoner, whom he knows to be guilty of a heinous offense, and who is convicted thereof. The penalty for the offense varies from five to twenty years, in the discretion of the court. Owing to his influence with the court, A could probably secure for his client the minimum sentence. What is his duty in the premises?

33. A, while acting as attorney for X in a confidential way, learns that a certain mortgage given by X to his brother has no consideration and is fraudulent and void as against X's creditors. Having ceased to be employed by X, he is afterwards employed as attorney for a creditor of X to collect an indebtedness due from the latter, who is now insolvent. What use, if any, can A make of the information that he obtained while acting as attorney for X, that the mortgage to the brother is without consideration and fraudulent and void as to his present client?

REAL PROPERTY.

34. Is the following a valid description in a deed in Ohio? If so, how is the land to be laid out?

Ten (10) acres out of the southeast corner of the west half (½) of the northwest quarter of section ten (10) township three (3) north of range eight (8) east in Henry County, Ohio.

(Note.—The township and range aforesaid lie in the county named.)

35. A certain term of the Common Pleas Court in Lucas County, Ohio, began January 3, 1898. During said term on January 30, 1898, A recovered a judgment against B for $2,000 in an action begun August 19, 1896. B purchased certain real estate and took title thereto in fee simple on January 1, 1898, and on January 18, 1898, mortgaged it to C for $1,000.00, this mortgage being filed for record January 19, 1898. On January 29, 1898, B mortgaged the realty to D for $200.00, this mortgage being filed for record February 10, 1898. And again on February 4, 1898, B mortgaged the land again for $500.00 to E; the latter mortgage being filed for record on February 5, 1898.

State the liens above in the order of their priority.

36. Would a deed of lands in Ohio correctly executed in all other respects by John Smith and Mary, his wife, but having an acknowledgement written as hereinafter stated, have passed the dower interest of Mary Smith in 1870? In 1880? In 1890?—viz.:

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The State of Ohio, Franklin County, ss.

Be it remembered, that on the 19th day of January, 1870 (or 1880 or 1890, as the case may be), before me the subscriber, a justice of the peace within and for the said county, personally appeared John Smith, the grantor in the above conveyance, who acknowledged the signing and sealing thereof to be his free act and deed.

I further certify that I did examine the said Mary Smith, wife of the said John Smith, separate and apart from her said husband, and did then and there make known to her the contents of the foregoing instrument, and upon that examination she did declare that she voluntarily signed and sealed the foregoing deed and that she is still satisfied therewith.

In witness whereof I have hereunto set my hand officially, on the day and year last aforesaid. (Signed)

THOMAS JONES,
Justice of the Peace.

37. A, the owner of a piece of land laid out into four house lots, intending that the same should be occupied for residences only, gave deeds in fee simple of said lots to B, C, D and E (to each of said grantees one of said lots), each deed of conveyance containing a condition to the effect that no buildings other than for dwelling purposes should be erected on the lot conveyed, and each deed containing a clause of re-entry in favor of A and his heirs and assigns for condition broken.

B being subsequently about to erect a store building on his lot, and C objecting thereto, C requests your services for the enforcement of his rights. What action lies?

38. By proceedings regularly had, a guardian obtained an order in a Probate Court of competent jurisdiction for the sale of certain lands of his minor ward, and the due confirmation of an appraisement thereof made by appraisers duly appointed. Thereupon said court, finding and stating upon its journal that the guardian upon his appointment had given bond with reference to the value and sale of said real estate, dispensed with the giving of any additional bond and ordered the guardian to sell the lands in question and thereafter confirmed a sale made by the guardian under such order; Did title pass to the purchaser under such sale?

Suppose the guardian, upon his appointment, had not been required to give, and had not given, any bond, and sale of the land in the above proceedings had been ordered without requiring bond, and the sale had been made and confirmed. Would the purchaser under such circumstances have taken title?

39. An abstract of title to a certain tract of land in Ohio shows the following:

1st. A title in fee simple in A to the land on April 12, 1857.

2d. A deed of general warranty from A and wife to B and the heirs of his body, on said April 12, 1857.

3d. A general warranty deed from B and wife to C, on August 4, 1867.

4th. A deed of general warranty from C and wife to D and his heirs and assigns, on August 14, 1868.

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5th. A quit claim deed from E and F to D and his heirs and assigns, on August 16, 1873.

Each of the above conveyances was regularly executed, acknowledged and forthwith recorded, and the description of the realty in each was correctly drawn.

In connection with the above, satisfactory proof is also made that said E and F were, on August 16, 1873, unmarried and the only issue then living of B; that said E died, November 18, 1875, unmarried and without issue; that said F died, August 19, 1883, leaving no widow but leaving G his sole heir, then eight years of age; that said B died, October 27, 1888, leaving the above named G, his grandson, and one H, his son, born in 1876, as his sole issue, and also leaving a widow who died October 30, 1892; that C died August 10, 1872; and that all the other parties in the title are living.

State exactly the interest (if any) that H has in the realty in question at this date.

40. For how long a term may a valid lease of lands in Ohio be granted by parol? By a written lease, not acknowledged?

PERSONAL PROPERTY.

41. A, the owner of certain chattel property, was approached by B, who falsely represented to A that he (B) had a customer (C) for the goods in question. Whereupon A delivered the chattels to B under the agreement that B should that night either return to A the chattels themselves or the price thereof ($182). B thereupon sold the same to D, who was entirely innocent of any knowledge or notice of the arrangement between B and A, for the agreed price of $182 then paid to B, who thereupon left the country without paying the money over to A. Could A maintain replevin for the chattels against D? Could he maintain replevin against D if D knew of the arrangement between A and B? Would it make any difference in this case if B had told A he intended to sell them to D for the agreed price of $182?

42. A, desiring six beef cattle, employed a drover to purchase the same for him. The drover sent out his buyer to purchase these six and also to purchase six other beef cattle for the drover himself. The buyer purchased the twelve cattle according to instructions, but by mistake delivered five of them to A and seven of them to the drover, his employer. Before A discovered the error one of the seven cows delivered to the drover gave birth to a calf. What are the respective rights of the drover and A in the calf?

43. A, in May, 1897, delivered to B a piano upon a written contract of sale providing that B should pay $200.00 for the same in ten monthly installments of $20.00 each, the title to the piano to remain in A until full payment of all installments. B paid three installments and then sold the piano to C, who purchased in good faith without knowledge of the terms of the agreement between A and B.. B defaulted all other payments.

Can A maintain replevin against C for the piano?

If so, upon what principle of law? If not, what could have been done, if anything, by A either originally or later, that would have placed him in position to have maintained the action?

44. (a) Are engines and boilers, permanently annexed to foundations resting on the freehold and supplying motive power to the fac-

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tory ordinarily to be treated as fixtures or as personalty, as between a mortgagee of the freehold and a judgment creditor with levy on the engines and boilers?

(b) What is the rule as between the same mortgage and levy as to the machinery in the factory propelled by said engines, such machinery being attached in the ordinary manner customary in the trade?

CONSTITUTIONAL LAW.

45. When may the privilege of the writ of habeas corpus be suspended?

46. What, if any, form of government is guaranteed to every state of the Union by the constitution of the United States?

47. In what cases, if any, may the legislature provide for imprisonment for debt?

48. If a judge of the Common Pleas Court dies, how is the vacancy filled?

EVIDENCE.

49. What is a deposition?

50. A is struck by a railroad train, knocked off the track into the ditch, climbs upon the bank and sits down; the train is stopped, some passengers go back to see him. A gives them an account of the accident. Is what A said admissible in his favor on a trial of his suit for damages against the railroad company? Give reason.

51. A sues B for damages for assault and battery. C was present and witnessed the whole affair. Before the case comes on for trial C dies. Knowing that he must die within a few hours, and without any hope of recovery, C makes a written declaration stating the facts of the assault. Is the declaration admissible on the trial of the action for assault and battery? Give reason.

52. Suit on a promissory note, dated April 3, 1895, given by A to B. The execution of the note is denied. John Smith is the first witness put upon the stand. He is asked the following questions:

Q. Your name is John Smith, is it not?

Question objected to as leading. Court overrules the objection. Is this error? Give reason.

A. It is.

Q. Did you, on the 3d day of April, 1895, see A sign and deliver to B a paper writing? A. I did.

53. Q. What was the substance of that writing?

Is this last question objectionable? Why?

54. A is indicted for murder. B is the first witness for the state. He is asked what is A's reputation as to being a quiet and peaceable man. Is the question objectionable? Give reason.

55. A sues B on a written contract for the rent of a house for six months beginning January 1, 1897, at $10.00 per month. B offers to prove that April 1, 1897, A reduced the rent of the house to $9.00 per month and B agreed to keep the house twelve months. Is the evidence admissible. Give reason.

WILLS.

56. (a) What is a will?
(b) Who may make one?

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(c) What degree of mental capacity is requisite?

(d) What kind of property may pass by will?

57. (a) What is a nuncupative will?

(b) What kind of property can be disposed of by a nuncupative will?

(c) Within what time must a nuncupative will be admitted to probate?

58. In paying the debts of a testator how should beneficiaries under the will contribute when the property undisposed by will is insufficient?

59. (a) When is a bequest to charitable purposes void?

(b) What is a "specific devise"?

60. In the trial of an issue made up to determine the validity of a will, after the order of probate is offered in evidence, what is the effect of the provision of the statute, that, on the trial of such issue, the order of probate shall be prima facie evidence of the due attestation, execution and validity of the will?

61. (a) What is the difference between a "'gift causa mortis" and a "nuncupative will"?

(b) What is meant by a residuary clause?

TORTS.

62. (a) Define the term tort.

(b) Name the several classes into which divided and give example of each.

63. When, if ever, may a tort be the subject of a civil action and at the same time an indictable offense?

64. May the same act be a tort and at the election of the party injured be treated as a breach of contract? If so, state in what cases, and give example.

65. (a) A and B were joint tort feasors, acting by agreement and with a full knowledge of each other's acts. C, the injured party, sued A only, for the damage arising from the wrong inflicted. Could he maintain his action or must he join B as a defendant?

(b) Suppose that in the foregoing question A and B had acted without any agreement, and without knowledge as to what the one or the other was doing and that the injury complained of was the result of both their acts, and C had sued A only; could he maintain his action? Give reason for answers.

66. A who was in the habit of hiring men, maliciously kept B the owner of a house from letting it, by announcing that he would not hire anyone who should take it. Could B maintain an action against A? Give reason for answer.

EQUITY.

67. (a) Give briefly the history of the origin of equity jurisprudence.

(b) By what courts is equity jurisprudence administered in Ohio?

68. (a) What are the main subjects or topics embraced in equity?

(b) Give not less than six maxims of equity. 4

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69. Jones owns a private lake stocked with fish. Brown, a neighbor, trespasses daily by entering on Jones' land and fishing in the lake under claim of right and threatens to continue the acts. Jones wants an injunction. What would you advise, and why?

70. A owns lots one to ten inclusive of Boom's Addition to Columbus. B has a mortgage on all said lots. A sells to C lots one to five of said lots. Subsequently B forecloses his mortgage. What rights would you claim as attorney for C, in his answer and cross-petition?

71. A and B were farmers in 1870 owning farms separated by a creek, each owning to the center of the creek. Since that time the creek has gradually washed on and toward B's farm until now it is seventy-five feet from the original bed. Where is the true boundary line now? State rule as to change in boundary streams.

72. A, who owns a one-thousand acre tract of land, sells B a fifty acre piece at the rear end thereof, not accessible by the road, the remaining nine hundred and fifty acres lying between B's fifty acres and the road. The deed was silent as to entrance or egress. The first time B attempted to drive back to his fifty acres he was stopped by A. What are the rights of the parties?

NEGOTIABLE INSTRUMENTS.

73. Between what parties is the consideration for negotiable notes and bills open to inquiry?

74. A signed a note with amount and name of payee in blank for accommodation of B with the express agreement with B that he should use the same in payment for a horse, and that the note should be used for no other purpose and should not be used for a greater amount than $100.

How could A have limited his liability so that B might not have used the note in payment of $500 for a stock of merchandise?

75. $200. Columbus, O., May 1, 1897.

One year from date I promise to pay C D, or order, two hundred dollars with use, value received.

A B as Administrator of the Estate of X Y.

Before the note was due C D sold and transferred same to E F for value.

What defenses could be set up by maker in suit brought by E F?

76. The bona fide holder of a negotiable instrument indorsed by B in blank wrote over the indorsement of B, "I hereby waive all right to demand for payment and notice of dishonor of the within." How, if at all, would the indorsement affect the liability of the indorser?

77. What notice is required to fix the liability of a Surety, Guarantor and Indorser of negotiable paper?

PUBLIC AND PRIVATE CORPORATIONS.

78. Can an Ohio corporation purchase shares of its own stock, and if so, under what circumstances? Can an Ohio corporation purchase shares of another Ohio corporation, and if so, under what circumstances?

79. A person purchases fully paid up stock in an Ohio corporation from its true owner, who has full legal right to sell it; a proper transfer to the purchaser, authorizing the corporation to transfer the

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stock on its books, is indorsed on the certificate representing the stock, signed by the vendor; the purchaser presents the certificate to the proper officer of the corporation, and demands that the stock be transferred to him by the corporation; the corporation refuses to do this. What are the rights and remedies of the purchaser under Ohio law?

80. What is the liability of the owner of stock in an Ohio corporation in addition to any liability upon his subscription for the stock? What is the source of this liability? In whose favor does this liability exist? To what corporate liability does this stockholder's liability extend in the case of any given stockholder? Give summary statement of the procedure for enforcing this stockholder's liability.

81. What are the rights of a pledge of stock? State all his rights, but make the statement a summary one, without going into detail. How is such a pledge properly made?

82. a.—A person contracts with a de facto corporation. In an action by such corporation on the contract can such person deny its corporate existence and capacity? Why?

b.—A person contracts to buy property of a corporation. In an action by the corporation on such contract can such person plead as a defense that the contract was ultra vires? Why?

83. Under what circumstances can a stockholder of a corporation enjoin corporate action which the Board of Directors is about to consummate?

84. Into what general classes are the powers of a municipal corporation divided, and what in general is the liability of the municipal corporation for negligence in the exercise of each class of powers?

CRIMINAL LAW.

85. (a) Of how many persons is a grand jury composed in this State?

(b) How many grand jurors must concur in the finding of an indictment?

(c) What is an indictment?

86. (a) What offenses are bailable in Ohio?

(b) Who is an accessory?

(c) Can an accessory be convicted of a higher degree of crime than the principal?

(d) What are felonies? What are misdemeanors under the Statutes of Ohio?

(e) A stole a horse worth $20. Was this a felony or misdemeanor? Give reason for answer.

87. (a) What property was the subject of larceny at common law?

(b) What may be the subject or larceny in Ohio?

(c) When a promissory note is the subject of larceny: How is its value determined?

88. (a) What are the degrees of homicide in Ohio?

(b) What is the punishment for each?

(c) W purposely and of deliberate and premeditated malice struck with intent to kill C. The blow took effect upon and killed K. What, if any, crime was W guilty of?

89. (a) H was indicted, tried and convicted. The indictment was insufficient, and the defect was one of substance and not of form; could objection be made after verdict was rendered? If so, how, and

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what should the judgment be?

(b) Suppose H in the foregoing question had plead guilty, should the judgment be different?

90. (a) Where the defense is an alibi, what proof is necessary to make it a good defense?

(b) Where in a trial for murder, the accused sets up his insanity as a defense, upon whom is the burden of proof; and what degree of proof is necessarry to establish it?

PLEADING.

91. (a) How may a married woman sue and defend in Ohio?
(b) How may an infant sue and defend in Ohio?
(c) How may a partnership sue and be sued in Ohio?

92. (a) Define "pleadings."
(b) What pleadings are allowed under the code?
(c) What is the object of pleadings?

93. (a) How do issues arise, and what kinds of issues are there?

(b) In what three stages of the pleading may issues of fact arise under the code?

(b) In what three stages of the pleading may issues of fact arise under the code?

(c) How are issues of law tried?

94. Write a præcipe for summons in an action brought by A B against C. D in the court of common pleas of Franklin County, Ohio, in which judgment is asked for $500 upon a promissory note, with interest at six per cent. from January 1, 1898.

95. Write an affidavit in which, as attorney for plaintiff, who is a resident of Illinois, you verify the petition in the above action.

BAILMENTS.

96. What is the distinction between a sale and a bailment?

97. A, finding his friend B's horse and buggy standing on the street, in B's absence and without his knowledge or consent, takes them to drive in another part of town, intending to return them as soon as he could make the trip. On the way the horse is killed by accident but without negligence on the part of A. What is the measure of A's liability, and how does it differ, if at all, from what it would have been if A had taken the horse and buggy with B's consent?

98. In September last farmer Smith borrowed ten bushels of wheat from farmer Brown for seed, agreeing to return a like amount from his crop after the next harvest. What is the legal character of this transaction?

99. What is the difference between the measure of liability of an innkeeper and that of a boarding house keeper for the goods of guests while in the house?

100. A deposits certain packages of goods in the warehouse of B to be kept for him for hire. B subsequently learns that the goods in fact belog to him, and that A's possession was wrongful. A tenders the price of storage to B and demands the goods, but B refuses to surrender them asserting his ownership. At this stage of the case B consults you as to the course he should pursue. What would you advise him?

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

The question of Bar Examinations is causing much comment. An editorial in the Law Student's Helper comments on the large number of failures among the applicants at the Ohio Bar Examination held in June last. From the large percentage of failures the writer concludes that the examination was more severe than occasion required.

Two elements go to determine the success or failure of an applicant: The *knowledge* of the applicant; the severity of the examination. There is a strong sentiment in favor of higher qualifications on the part of applicants. It is a serious thing for a young man to represent himself qualified to act as legal counsellor and attorney, in all matters however weighty, even to those of life and death. It is a more serious thing for the state to add its indorsement to his representation. The standard has been too low in the past. The ranks contain many who are not qualified to practice law. The underhanded practices to which these ill-qualified persons must resort in order to obtain a living create an unjust sentiment against the profession, and result in distrust and lack of respect for all that in any way pertains to law and lawyers.

But it is not only for the benefit of the community at large, and those already in the profession that the standard should be raised. The welfare of the student himself demands it. The *study* of law is becoming more of a science every day. Better facilities for its study are being provided. Better equipped students are entering the profession. *Thorough equipment is necessary to success.* Experience shows that sys-

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tematic study of law as a science ceased upon admission to the Bar. Therefore the student, for his own good, should be held back until he is equipped. The only practical method is a system of examinations. This method is not perfect; but it is more perfect than any other. The argument is made in the editorial referred to that the best examination mark does not necessarily mean the best equipment. This is in a certain sense true; but it becomes less and less true as the examination increases in severity—the more severe, the better the equipment required.

The percentage of failures is no test of the quality of the examination. It only shows that the applicant has failed to come up to requirements. Whether an examination is too severe or not severe enough must be determined from a scrutiny of the questions themselves in the light of the requirements deemed proper for admission to the bar.

Judge Thomas M. Cooley, whose name is so familiar to the student of law, has passed away at the age of 74. His early career was much after the plan of other great men—raised on a farm. For some years after admission he struggled against adversity and all the discouragements which can come to the young man endeavoring to gain a foothold in the profession. Over thirty years he had been connected with the Law Department of Michigan University. It was during this period that he produced the many valuable works that are today and will be for many years to come the most fruitful source of reference on our written law. While the profession has sustained an irreparable loss, yet there has been left behind his best and greatest thoughts—the product of a lifetime of study. He was many times honored by positions of trust which came to him unsought. He served on the Supreme Bench of Michigan for twenty years and later upon the Interstate Commerce Commission by appointment of President Cleveland. On the construction and interpretation of constitutional questions he was regarded as the highest authority in the land. The whole life of this admirable man stands forth as an example of what rigid perseverance and devotion to labor can accomplish.

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Recent Cases.

(Decided Since Our Last Issue.)

CONTRACTS — STIPULATION AGAINST ASSIGNMENT—Contract between plaintiff and defendant contained the stipulation that the party of the second part shall not assign the contract without the consent of the party of the first part. Held, this excludes the right to assign money due or to become due under the contract.

City of Omaha v. Standard Oil Co., 75 N. W. (Neb.), 859.

The general rule is that without any express stipulation the burden of a contract is not assignable while the benefit thereof may be assigned. Were there is no express stipulation in the contract above the company might transfer the right to receive money under the contract. There being an express stipulation that the contract shall not be assigned, the court, it seems, correctly says, one of the elements of the contract was the duty of the city to make monthly payments, and thus came under the express inhibition of the agreement.

CRIMINAL LAW—CONDUCT OF TRIAL—During the trial the jury inspected the locality of the crime, in the absence of the defendant, the latter's counsel having waived his rights. Held: Not such error as will justify a new trial.

State v. Thorn, 50 N. E. (N. Y.), 947.

The New York court in this case settled a much disputed point, whether such inspection in defendant's absence amounted to error depended upon whether such inspection was a part of the trial. The court holds, O'Brien and Bartlett dissenting, that it does not amount to the taking of evidence, but is designed simply to enable the jurors to more accurately understand the testimony when it is given in court. The provision of the constitution that "the accused shall be confronted with the witnesses against him" is thus not infringed. Ohio holds the same rule.

CRIMINAL LAW — INCONSISTENT VERDICT—Two persons were jointly indicted for illegally selling liquor, the only evidence being that of a single witness, which was the same against each defendant. The jury convicted one and disagreed as to the other. Held: The verdict will be set aside.

Davis v. State, 23 S. R. (Miss.), 770.

The general rule is that where two are jointly indicted for the same offense the jury may acquit one and convict the other. But this, as the court points out, is true only when the evidence warrants it; when there are two or more witnesses, or where the evidence of a single witness differs as to one or the other of the defendants. In the above case, from its very nature both must either be acquitted or both convicted. Terral, J., dissented.

CONSTITUTIONAL LAW — PLUMBER'S LICENSE — (58 O. S. Adv. 599). —The case of The State v. Gardner is worthy of comment. In it the supreme court declared the unconstitutionality of the Plumbers' License Law. The court first discussed the legality of a law requiring plumbers to undergo an examination for fitness, and be licensed, before engaging in business. The constitutionality of such a law is declared by way of dictum. The real decision is the unconstitutionality of the law because of unequal operation—the act providing that in case of a firm or corporation engaged in plumbing, a license to one member was sufficient for all. With the dictum and the decision we agree, but the court indulged in some expressions which may be questioned.

The right to labor is not an unqualified one. The immediate contracting parties are not the only ones whose interests are affected. Every trade, calling or profession affects in a greater or less degree the public interests, and to that extent is a public business, and, therefore, subject to regulation by the public. The extent of the public interest in any particular calling, and the extent of the regulation of that calling, are matters to be determined exclusively by the public, because the fundamental principle of government is the subordination of private to public interests when there is a real or apparent conflict. This regulation is legislative in its nature and rests under our form of government absolutely in the legislature—they are to weigh the policy of the proposed regulation. The question of its reasonableness rests with them. The regulation being clearly legislative, there is but one limit which can be placed upon the legislature

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in regard to the regulation—they must act as reasonable men. We may believe a regulation to be unreasonable, that is a matter of individual judgment; but it is not a necessary conclusion that because we regard a regulation as unreasonable, therefore the legislature could not have acted reasonably in enacting it. The two are radically different.

Therefore we must differ from Judge Spear when he asks, "Does the act unreasonably interfere with the right to labor?" and proceeds to discuss the law from that standpoint. The question asked is one for the legislature, not for the court. The court is using legislative scales, and not judicial ones to weigh the constitutionality of the act. The judicial test is, "Can we say that the legislature, having in view a certain object clearly legislative in its nature, could have acted as reasonable men in passing a given act purporting to attain that object?" Farther than this the court should not go. If it does, it invades the legislative field. We may feel the need of a revising legislative power, but the remedy lies in better legislature, rather than a disregard of its proper functions by the judicial branch of the government.

EX-POST FACTO LAW—POLICE POWER——A statute of New York prohibits any person from practising medicine after the conviction of a felony. Defendant, a physician, had been so convicted before the passage of the statute, and because he continued to practice thereafter was convicted for violation of its provisions. Held: The statute is not ex post facto, and judgment affirmed.

Hawker v. People, 18 Sup. Ct. (U. S.), 573.

The ground for upholding the constitutionality of the measure is that it is a legitimate exercise of the police power of the state. Under the police power the state may define the qualifications of one who practices medicine. Good character is an important qualification; and violation of the criminal laws is evidence of bad character. Justices Harlan, Peckham and McKenna dissent.

JEOPARDY — Defendant was arraigned for procuring signatures to promissory notes by false pretences. After swearing of the jury and taking of testimony, the court decreed the proceedings to be quashed and prisoner discharged. Subsequently the order to quash and discharge was vacated, trial had and defendant convicted. Held: The conviction was erroneous on the ground that defendant had been in jeopardy in the first trial.

People v. Taylor, 76 N. W. (Mich.), 158.

The court unanimosly holds with the weight of authority. It is true that no verdict was rendered in this case (some authorities seem to hold that legal jeopardy doesn't attach until verdict); but what did take place was practically a verdict of acquittal by direction of the court. The court distinguishes Stewart v. State, 15 O. S., 155. In the latter, after the jury had been sworn it was found that one of the jurors had been in the grand jury finding the indictment. The jury was discharged and defendant convicted by another jury. The decision is based on the fact chiefly, that it was at the defendant's instance that the jury was discharged. He objected to the jury and cannot complain because the court did the only thing it could do in sustaining this objection.

MUNICIPAL CORPORATIONS — LIABILITY—Plaintiff's buggy was injured by the negligence of the driver of a sprinkling wagon, who was an employé of the defendant city. Held: Defendant not liable.

Conelly v. Nashville (Tenn.), 46 S. W., 565.

The court follows the rule laid down in numerous cases, that the municipality is not liable for the negligence of its servants in discharge of a governmental duty, as contradistinguished from one that is purely corporate or ministerial. Sprinkling the streets is an act "to secure the general health of the inhabitants," and is the discharge of a governmental duty. A similar case was decided by the Ohio supreme court, and reported in 40 W. Law Bul. 83, Frederick vs. The City of Columbus. Plaintiff's intestate was injured on a public street of the city through the negligent handling of a fire tower by the fire department. On substantially the same reasoning the court holds the defendant not liable. The court says: The grounds of exemption from liability are that the corporation is engaged in the performance of a public service in which it has no particular interest, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the community.

PRESUMPTION — IGNORANCE OF LAW—Defendant was indicted for being a common cheat, in that by representing to the wife of one Mallory that he could

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compromise the crime alleged against her husband, received $50 from her. Held: Defendant guilty.

Ryan v. State, 30 S. E. (Ga.), 678.

The defendant in this case attempted to excuse himself in this case by invoking that perplexing maxim, "Ignorantia legis neminem excusat." He contended that Mrs. Mallory was chargeable with the knowledge that a felony could not be compounded. But the court, quoting the words of Maule, J., in Martindale v. Falkner, "There is no presumption in this country that every person knows the law. It would be contrary to common sense and reason if it were so," held that the maxim cannot at any rate be a defense to criminal liability. It is to be noticed in this case also that it is not his own ignorance of the law, but that of his victim, which he attempts to set up.

Ohio Digest.

(Sept. 5 to Oct. 3, Inclusive.)

Accord and Satisfaction. Acceptance of a sum less than the amount due, in full satisfaction, will bind creditor if payment is made in any place other than where it was by original contract to be paid, or if pending litigation is thereby settled. 8 O. C. D., 628.

Appeal In a case where either party is entitled to a jury, case is not appealable. 8 O. C. D., 624.

Appropriation. Owner of land has right to hearing in court only upon question of compensation, not upon question of appropriation. 5 O. N. P., 471.

Must be made in good faith, and where bad faith is charged parties interested are entitled to determination of this issue by a jury. 5 O. N. P. 418.

Assignment. Where a firm purchases goods, knowing that they are about to become insolvent, it may be inferred that they had no reasonable expectation of being able to pay therefor, and vendor will be entitled to return of the goods. 5 O. N. P., 427.

Where assignee conducts the assigned business as a going concern, improving it, paying off debts, and intending to turn it over to owners as soon as debts are paid off, the property is subject to taxation in his hands. 5 O. N. P., 438.

Attachment. Where an attachment schedule and appraisement is omitted by order and consent of a defendant, and no rights of other creditors are involved, such defendant will not be heard to object to the omission. 5 O. N. P., 439.

Bill of Fxceptions. Additions made after signing and sealing probably render bill invalid. 16 C. C., 224.

Board of Education. In absence of fraud, etc., township board cannot be compelled by mandamus to show why it refused to confirm election of teacher made by local board of sub-directors. 5 O. N. P., 446.

Bond. Action on a bond given under 87 O. L., 216, "to prevent abandonment and pauperism," must be brought in name of the state. 7 O. D., 425.

Contracts. A contract for sale of earth to be removed from a lot is a sale of real estate and within Statute of Frauds. 8 O. C. D., 668.

Constitutional Law. Act of April 18, 1892, requiring certified nominations of candidates is valid. 58 O. S. Adv., 620.

Rev. Stat. §4155-1, relating to chattel mortgages and foreclosure, is valid. Invalidity of part will not void the whole statute. 7 O. D., 405.

Rev. Stat. §8223-84, regarding excavations, is unconstitutional because not of uniform operation throughout state. 7 O. D., 414.

Rev. Stat. §2575-53, providing for appointment of inspector of buildings, is unconstitutional. 8 O. C. D., 656.

Contempt. Order in contempt proceedings for payment of $550 alimony with costs and attorney's fees by a defendant whose earnings are small and required for support of his family, is excessive and defendant cannot be imprisoned for failure to comply. 8 O. C. D., 546.

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Conversion. In case of conversion one may waive tort and sue on implied contract; in such case attachment will lie. 7 O. D., 409.

Courts. Under §2, Art. IV, of the Constitution of the United States, citizens of one state may choose courts of another state to settle their differences, if jurisdiction is obtained. 7 O. D., 412.

Criminal Law. One committed by examining magistrate will be released on habeas corpus if not indicted by next regular grand jury, unless same was omitted for cause mentioned in Rev. Stat. §7211. 5 O. N. P., 469.

The rule that one is presumed to intend the natural and probable consequences of his act is inapplicable where evidence showing the circumstances attending the act is introduced, the intent then becoming a question of fact for the jury. Use of a deadly weapon does not raise a conclusive presumption of intent to kill. 16 C. C., 226.

Damages. Measure of damages in sale of personalty by false representations is difference between actual value and what would have been the value had representations been true; interest may be included in awarding damages arising from actions for tort. 8 O. C. D., 572.

Expense incurred for medical attendance in personal injury case cannot be taken into consideration by jury in absence of testimony showing amount of such expenditures. 8 O. C. D., 584.

Divorce. Cannot be granted where defendant is insane. 16 C. C., 302; 8 O. C. D., 652.

Dower. Dower interest in unimproved lands may be determined by appointment of appraisers to fix value of land. 8 O. C. D., 665.

Drains. Construction of drains is an exercise of police power of state, the necessity for which is to be determined by a jury; to return a valid verdict only necessary that eight jurors agree, for or against. 5 O. N. P., 454.

Drainage of wet lands which are unfit for cultivation and a source of disease is a purpose sufficiently public to justify the exercise of eminent domain. 5 O. N. P., 449.

Equity. Equity against a dealer is equally valid against a judgment creditor, whose lien is obtained subsequently to prior creditor enforcing his equity. 8 O. C. D., 657.

Evidence. Court in its discretion may allow a party to bring witnesses in rebuttal to testify to matter claimed to be matter in chief, concerning which such party had already examined witnesses. 8 O. C. D., 596.

Where in a case presented for review, the evidence on one side is clear and consistnt, while on the other side it is inconsistent with itself and with known facts, though there be a conflict of evidence, such conflict will not prevent court from setting aside verdict as against the evidence. 8 O. C. D., 578.

Independent Contractor. Employer is liable for negligence of contractor when injury is one that might have been anticipated as a natural and probable consequence of work. 8 O. C. D., 556.

Where a duty devolves upon one by law, he cannot shift the liability by committing execution of such duty to a contractor. 7 O. D., 401.

Injunction. Will be granted to prevent commission of a crime, provided the action complained of also involves the invasion of the property rights of individuals. 5 O. N. P., 411.

When equity can give adequate relief, otherwise it will not issue injunction. 5 O. N. P., 423.

Insanity. No judgment against an imbecile after appointment of guardian, in an action in which guardian is joined, becomes a lien upon the lands of such imbecile. 5 O. N. P., 413.

Insurance. Where suit is brought over 6 months after decease of insured, on a policy providing that suit must be brought within 6 months, if a verdict is rendered for plaintiff, reviewing court will not disturb verdict because of time limit. 16 C. C., 294.

Attack on award made by appraisers as to loss may be made in action brought on the policy, and need not be by separate prior action. 8 O. C. D., 633.

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Judgment. Action in one county to enjoin collection of a judgment rendered in another county, on the ground that court rendering judgment had no jurisdiction of person of defendant, is not a collateral impeachment and is maintainable. 5 O. N. P., 415.

Amount of a judgment paid into court is subject as regards future disposition to control of court and reasonable attorneys' fees will be paid therefrom. 5 O. N. P., 426.

Joint plaintiffs in whose favor a judgment has been rendered will not be permitted to litigate, as a continuation of case after judgment, a controversy between themselves as to ownership of judgment. 5 O. N. P., 426.

Lease. Where a tenant in possession under a written lease fails at end of term to come to agreement with landlord on a new lease, a holding over is under old lease, from year to year; right of owner to rent not affected by subsequent abandonment by tenant without agreement. 8 O. C. D., 551.

Libel. Publication of court proceedings by newspaper is privileged and no liability will attach unless report is false and malicious. 8 O. C. D., 621.

Master and Servant. Master is bound to furnish reasonably safe appliances to working men; he is chargeable with knowledge of all defects which reasonable and ordinary care would have discovered. 8 O. C. D., 596.

Mayor. Has no authority to revoke license granted by council and if he unwarrantably interferes with business conducted under such a license, he is reasonably liable. 8 O. C. D., 649.

Mortgages. A mortgage imports a consideration and burden is on one setting up want of consideration to make his proof. 7 O. D., 410.

Mortgagee of chattel property, such as is described in Rev. Stat. §4155, must foreclose in a court of record and cannot evade foreclosure by sueing on mortgage debt and issuing execution. 7 O. D., 420.

Mortgage to A, "his successors and assigns forever," where intention was to pass entire estate, held to pass the fee although word "heirs" was omitted. 8 O. C. D., 625.

Municipal Corporation. Powers conferred on municipal corporations with respect to corporate funds and property are public trusts and cognizable in a court of equity. Equity will interfere to prevent the exercising of such power in a manner contrary to sound legal discretion. 5 O. N. P., 426.

City ordinance, establishing police force and fixing compensations, as it involves an expenditure of money and creates a right, must be submitted to mayor for approval. 5 O. N. P., 435.

Negligence. Where answer alleges contributory negligence and no reply is filed thereto, but defendant proceeds to trial as though reply had been filed, failure to file a reply will not be ground for a new trial. 16 C. C., 308.

City is presumed to have notice of long standing and obvious defect in sidewalk. 16 C. C., 308.

Negligence of driver not to be attributed to any other person in a vehicle. 16 C. C., 516.

Failure of railroad to erect warning post at crossing is not available as proof of negligence to one acquainted with the crossing. 16 C. C., 516.

Railroad is not responsible for accidents to its employees where there is a needless violation of its rules. 8 O. C. D., 567.

It is duty of a conductor to see that a brakeman, whom he knows is engaged in coupling, is safe, before starting train. 8 O. C. D., 584.

Railroad not responsible for causing death of one wrongfully on its tracks. 8 O. C. D., 593.

New Trial. Motion for, by a defendant, will not prevent enforcement of judgment and immediate issuance of execution thereon. 7 O. D., 428.

Order of Sale. In suit to marshal liens, a decree for sale of the property once entered binds all parties to the case, and unless it is set aside or vacated, a second decree at petition of another lienholder and sale thereunder are irregular. 5 O. N. P., 460.

Railroad. Not bound to stop or slacken speed at crossing where person is seen crossing or about to cross track. 16 C. C., 576.

Real Property. Where land is devised to be sold and proceeds divided, a mortgage upon his interest in the land given by one of the beneficiaries is valid as against his share of proceeds of sale. 5 O. N. P., 441.

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Receiver. Where actual possession is necessary to aid receiver in performance of his duties, a writ of assistance will issue to put him in possession, on application of a party to the cause. 5 O. N. P., 419.

Pleading and Practice. Where answer is frivolous, equivocal or evasive, remedy is by motion to strike out and not by demurrer. 7 O. D., 413.

Costs in former action must be paid before proceedings in a second are allowed to go on. 7 O. D., 414.

Answer based on a promise required to be in writing must show that such promise was in writing. 5 O. N. P., 419.

Sale. On petition in error to reverse order confirming a sale on execution, it cannot be assigned for error that findings of a lower court were against the evidence. 5 O. N. P., 412.

Street Railroads. Location of, on a country road, where no substantial property rights of abutting owner are invaded, gives such owner no right to injunction, though he may sue for damages. 16 C. C., 252.

Where cars of a connecting street railroad when passing over track of another road are by contract to be entirely under the control of such other road while on its track, they are to all intents and purposes the cars of such other road so long as under its control. 5 O. N. P., 443.

City after making grant to railway cannot seek to have it declared void on account of want of consent of abutting property holders. 5 O. N. P., 457.

Specific Performance. To defend against action for specific performance as to real estate, it is not necessary to show that title is bad, but enough that it is questionable. 7 O. D., 408.

Summons. Person who is attending upon a judicial proceeding in a jurisdiction other than his own is privileged from service of summons upon him under such jurisdiction. 7 O. D., 423.

Taxes. Tax duplicate is prima facie evidence of amount and validity of taxes remaining due. Burden is on defendant to show that he delivered all taxable property to assessor and that taxes have been fully paid. 5 O. N. P., 466.

Trusts. Evidence to establish an express trust must be clear, certain and conclusive, not only as to existence, but as to terms of the trust. 7 O. D., 426.

Where land is purchased by husband and title placed in name of his wife, a resulting trust does not arise. 7 O. D., 426.

Venue. Affidavits supporting application for change of venue must consist of evidential facts positively stated; not enough when stated that affiants believe an impartial trial impossible. 5 O. N. P., 419.

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THE

Western Reserve Law Journal

Vol. IV NOVEMBER, 1898 No. 6

The Scintilla Rule and Its Relations to Trial by Jury.

"*Tout mon possible,*" shrieks the black Knight of Corporate Power, as he rushes, with lance in poise and visor down, toward the temple of justice. The legend, "*Ne vile fano,*" inscribed over the portals, causes the mailed warrior of Trusts to halt. "What now?"—asks the blind goddess guarding the entrance. "We want, we demand," replies the black Knight, "the abrogation of the Scintilla Rule; we are opposed to 'Medo-Persian stability' in the decisions and in the character of judges; we demand such flexibility in law and in courts, as will best suit our purposes, our ends and our aims." This is the demand, thinly disguised under the cry of "away with the Scintilla Rule," of corporation lawyers, fairly stated, as presented at the last two annual meetings of the State Bar Association. The Scintilla Rule is the personified sentinel of the Right of Trial by jury. Remove the sentinel, and successful assaults upon the system of Trial by Jury become easy and free from perplexing difficulties. What is the Scintilla Rule? I accept the definition, slightly modified, as given by Mr. Troup* in the October issue of the Journal. In a jury trial, after the plaintiff has introduced and presented all the evidence within his power or at his command, the defendant may move for a non suit, that is, ask for a verdict, notwithstanding the plaintiff's evidence. At this stage of the case the advocates of the Scintilla Rule contend that there is presented to the court a question of law, only, while the opponents of the Rule insist that there is presented to the trial judge a question of both law and fact. This claim is not openly made, but in effect their contention means this and goes to this extent. The English Rule adopted by the Federal Courts, following the holding in Pleasants vs. Fant, 22 Wall. 116, is given in clear and concise terms by Judge Dillon in "Laws and Jurisprudence," 130. That the two rules may be more readily contrasted and distinguished, I will use the deadly parallel.

*The Scintilla Rule. By J. O. Troup, Western Reserve Law Journal, October, 1898.

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SCINTILLA RULE.	ENGLISH RULE.
If there is any evidence, including all reasonable inferences deducible therefrom tending to prove each material fact put in issue, and indispensable to a recovery, the case must be submitted to the jury.	In every case, before the evidence is left to the jury, there is a preliminary question for the judge; not whether there is literally no evidence but whether there is any (including all the inferences which the jury can justifiably draw therefrom) upon which the jury can *properly* find a verdict for the party producing it.

The meaning of the Scintilla Rule is plain. If there is *any* evidence, including all reasonable inferences deducible therefrom, tending to prove all the facts incumbent on the plaintiff to establish, in order to maintain his action, he has a right to have the *weight and sufficiency thereof* passed upon by the jury, and it is error in such case, on motion to non suit, to render a judgment against him.

It will be noticed that in the English rule the word "properly," is italicized. The italics are not mine. I give the rule just as Judge Dillon claims it to be. There are two essential points of difference between the two rules. Under the English Rule, the court is the judge of the inferences which the jury may or should draw from facts, because the rule limits the power of the jury in drawing inferences from facts to those which the judge may think are *justifiable*. The Scintilla Rule gives the jury the unqualified right to draw all reasonable inferences, favorable to the plaintiff's case, from the evidence before it.

Secondly, the English Rule gives the court the right to say in any case, whether the jury can or can not *properly* find a verdict on the evidence before it. This right the Scintilla Rule denies the court, where there is *any* evidence tending to prove the issues made by the plaintiff's pleadings. The jury might be of the opinion that it could *properly* find a verdict, but, if the court was of a different opinion, that ended the controversy, for the jury would be deprived of an opportunity to express its opinion. This rule carried to its ultimate consequences, means the destruction of the Right of Trial by Jury. What is to prevent a judge in any and every case from saying that from the facts in evidence, the jury cannot *justifiably* draw any inferences favorable to the plaintiff's claim, and that there is no evidence before it upon which it can *properly* find a verdict for the plaintiff. The answer to this contention is, that the plaintiff has the right to have the matter reviewed in a higher court. To this it may be truthfully said, that in nine cases out of ten, the plaintiff may not be able to pay for a record, and to begin his case again in the hope that he may strengthen it, would in most cases be a mocking delusion. In Ohio he cannot, of right, begin *de novo*. He is out of court. In personal injury cases, for instance, witnesses disappear readily; they change front frequently or become afflicted with serious loss of memory while they remain in the employ

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of the defendant. The further a litigant recedes from the point where his cause of action arose, the more difficult it becomes to obtain his legal rights. Besides, if the rule becomes extended and widened as it is ultimately bound to be, the higher court might be loth to question the *discretion* of the lower court, and no one will deny that the rule gives the trial judge, if he chooses to exercise it, a far-reaching discretion and a tremendous power. The Scintilla Rule, on the other hand, limits this discretion and this power and confines it within the sphere of the Right of Trial by Jury. It does not take from the court any inherent or constitutional power. It simply draws a line of demarkation beyond which the power of the court shall not go in jury trials. It is a rule of law prescribed by able, conscientious judges—legal giantsof the days when the upright, fearless judge and the incorruptible jury were venerated as the two main, impregnable pillars of the Temple of Liberty.

Let us now carefully examine, and in the light of able and clear precedents, determine, if we can, what the Scintilla Rule really means. The Rule is as old as our Jurisprudence—it has always been the rule in Ohio; it has had the sanction of the ablest jurists of a State that has produced many men of eminent legal learning and unquestioned, manly integrity. Foremost among these was Rufus P. Ranney, a man whose preeminently brilliant, natural and acquired conceptions of law, like the rising sun of a summer morn, caught the goddess of Justice "in a noose of light." In the 4 O. S. 645, this close thinker and clear reasoner said, "When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, *a question of law* is presented, whether the evidence before the jury *tends* to prove all the facts involved in the right of action, and put in issue by the pleadings. In deciding this question, *no finding of facts* by the court is required and *no weighing of the evidence is permitted.* All that the evidence in any degree tends to prove, must be recived as fully proved; every fact that the evidence, and all reasonable inferences from it conduce to establish, must be taken as fully established." It will be seen that Judge Ranney insists that when the motion for non-suit is interposed, only a *question of law* is presented. In deciding this question of law, the court must not weigh or attempt to find the probative value of the evidence. The court can say, that, as a matter of law, *there is no evidence* tending to prove all the facts involved in the right of action and put in issue by the pleadings; but if the judge, as I have sometimes witnessed, analyzes and discusses the evidence and draws inferences from facts proven in order to justify a non-suit, he is following the English and not the Ohio rule. When the court finds it necessary to weigh the evidence or to draw inferences from facts, the case is for the jury. It is only where *no* evidence is introduced by the plaintiff tending to support the issue or where it is such as to show *clearly* that he has no

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cause of action, that it is the duty of the court to direct a judgment of non-suit. 38 O. S. 392; 24 O. S. 83. If any other rule than this is permitted, the jury might as well be abolished at once, as it would soon cease to be of any possible utility. The opponents of this rule however, contend that the judge should be empowered to weigh the evidence and all inferences deducible from proven facts, and if, after having analyzed and probated the value of the evidence and all inferences deducible from facts, he is of the opinion that he ought to grant a new trial, should the jury find for the plaintiff on *that* evidence, then, in that event, he should order a non-suit. Here is where the road divides. We say if you grant such power to the court, it is useless to have a jury. We most strenuously insist, when a judge undertakes to weigh evidence and draw inferences from facts proven, he is usurping the province of the jury, "because," as Judge Ranney says in the case above mentioned, "it is the right of the party to have the weight and sufficiency of his evidence passed upon by the jury—a right of which he can not be deprived and involving an exercise of power for which, without his consent, *the court is incompetent.*" When a court undertakes to weigh evidence, his opinion is no better than that of any intelligent man on the jury. Taking the language of Judge Cooley—Torts 804—"if there is no room for *two* honest and apparently reasonable conclusions," to mean that there is no evidence in support of plaintiff's claim, no fault can be found with the proposition; but if it means that the court shall weigh the evidence and judge of the inferences to be deduced from proven facts, his opinion that there is no room for two honest conclusions may be of no greater value than that of any man on the jury. And right here I may say, that Mr. Troup is in error when he says that every one concedes that it is "the right and the duty of the trial judge to set aside a verdict which in *his opinion* is not sustained by sufficient evidence." This proposition is incorrect, because it places no limit upon the discretion of the court. It is a contention that whenever, in any case, the trial judge is of the opinion that a verdict is not sustained by sufficient evidence, he may set it aside. To concede this would be tantamount to an admission that the Scintilla Rule is based in error.

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is *manifestly so.*" 12 O. S. 146. It is here seen that it is not a mere question of *opinion* with the trial judge. There is a rule provided for his guidance. His opinion must operate only within this rule. Before he can set a verdict aside on account of evidential reasons, it must be plainly apparent to the mind, clearly evident to the senses and free from all doubt or obscurity, that the verdict is not sustained by sufficient evidence. Again, that grand old legal giant, Allen G. Thurman, in McGatrick vs. Wason, 4 O. S. 567, quoting from French vs. Millard, 2 O. S. 53, said, "*A mere difference of opinion* be-

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tween the court and jury does not warrant the former in setting aside the finding of the latter; that would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact." Language stronger than this could not be used. It must clearly appear that the verdict is so manifestly, obviously and palpably against the weight of the evidence, that it may fairly be said there is no evidence to support it, before either the trial court or a reviewing court will be justified in setting it aside. Judge Thurman further said in the McGatrick case, 575, "We must presume that the jury found the facts to be those above stated, as necessary to make the defendant liable. Should we disturb this finding? If it is *clearly* wrong we must do so. *If we only doubt its correctness we must let it alone.*" In French vs. Millard, 2 O. S. 53, the court said "*We are not satisfied that the verdict of the jury was right. But this is not enough.* A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter." This is the doctrine in Ohio today. Judge McIlvaine, a clear-headed able jurist, in 22 O. S. 134 said, "the verdict of a jury should not be set aside by the court to which it is returned on account of any mere difference of opinion between the judge and the jury as to the weight of the testimony, but only when the verdict is unsupported by or is against the *decided* weight of the evidence * * * and if the motion (for a new trial) be overruled a reviewing court should not reverse, unless the verdict is so clearly unsupported by the weight of the evidence as to indicate some *misapprehension or mistake or bias on the part of the jury, or a willful disregard of duty.*" So it will be seen, that in Ohio, at least, the lines within which the judicial discretion can act or the judicial opinion operate, are clearly defined. And this wise rule of law laid down by our Supreme Court is the necessary adjunct of the Scintilla Rule. The two rules stand or fall together. The main objection the Federalists, that is those who favor the rule of the Federal courts, urge against the Scintilla Rule is, that the words, "any evidence," really mean no evidence. That is, that the word "*any*,' as a measurer, so minimizes the quantity or amount of evidence, that a case can go to the jury where there is practically no evidence. This view is most clearly erroneous. If I say a man who suffers *any* damage is entitled to compensation, I am not to be understood as saying that a man who suffers *no* damage *is* entitled to compensation. If I say to my servant, if *any* man calls, say to him that I will return in an hour, I am not to be understood as meaning, if *no* man calls say to him that I will return in an hour. The word "*any*," as used in the Scintilla Rule, means, some, or a portion out of an actual or possible amount or quantity. It may, in fact, be all there is attainable of an actual or possible quantity. Any evidence is then, at least, *some* evidence, and if the plaintiff's case is

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supported by *some* evidence which the defendant's motion for non-suit admits to be true, why should the motion be granted? Indeed, can anyone tell or give a valid reason why, in the absence of countervailing testimony, the plaintiff should not be entitled to recover? Surely, when the motion to non-suit admits the truth of the evidence and concedes to the plaintiff all that the jury can find in his favor, not only from the evidence, itself, but from all the facts which the evidence inferentially conduces to prove, the defendant ought not to complain if the motion is overruled, for if he has faith in his position that there really is no evidence in the case supporting the plaintiff's claim, he cannot be injured, because he may join issue with the plaintiff or go to the jury on plaintiff's evidence, and if the jury should, through passion or bias, decide against him, the trial judge or the reviewing court will protect him. Or he may join issue, evidentially, with the plaintiff and batter down his thin wall of scintilla evidence by his own "cloud of witnesses." The whole trouble with the usual defendant in these days is, that he fears the judgment of twelve honest men, and prefers to stake his chances on the single opinion of a judge who may possibly be the creation of modern political methods. Mr. Troup seems to think the plaintiff is not injured by a non-suit, because he can have his case reviewed. Let us put that boot on the other leg. When the defendant's motion to non-suit is denied, why doesn't he refuse to put in any testimony? In all my experience in the trial of jury cases but one instance occurred in which defendant's counsel manifested the courage of their convictions by going to the jury, without introducing testimony, after their motion to non-suit had been overruled. If the defendant's motion is made in good faith, if he really believes the plaintiff has made no case and the jury decides against him, the reviewing courts are open to him to test the question. This would, perhaps, be a hardship to the poor corporation, as it would, have to pay for a record. But to compel the ordinary plaintiff to test, in a reviewing court, the correctness of a ruling that puts him out of court, would in nine cases out of ten, be not only a hardship but a denial of justice, as he could not afford the luxury of securing a bulky record without which he would find it impossible to get into a reviewing court. This is really the nub of the whole contention. The Scintilla Rule is a check upon a few judges. The majority of our judges stand by the rule manfully and fearlessly. If the rule can be abolished, then the few small men in accidental judicial authority, will have full swing to make the evidential fur fly when a motion to non-suit is presented. The able, conscientious judge is awed when grave responsibility is hrown upon him, and he proceeds with great care and deliberate caution, keeping always in mind the consequences of the decision he is called upon to render. On the other hand, the mentally small man who happens to be upon the bench, much to his own amazement and

wonder, is always flattered by the assumption of authority. When a motion for a non-suit is presented to him, it is an appeal to his pride, and to show how great and wise he is, he generally grants it. To this kind of a judge the Scintilla Rule is a great bore, a "Medo-Persian" relic of Anglo-Saxon barbarism, that has been kept alive in Ohio by such old fossils as Ranney, Thurman, McIlvaine and a host of other sturdy old school judges whose persons, whose characters, whose names and whose memories the foolish, purblind people of Ohio respect, revere and venerate.

It seems to me that Mr. Troup misconceives the genesis of a trial. He says, "One might as well say that a supervising architect, whose duty it is to pass upon the sufficiency of the foundation of a building, must reserve his judgment until the building is completed." That is, a trial is like unto a building whose foundation is the plaintiff's evidence, and whose superstructure is the defendant's testimony. The illustration is not a happy one. If the plaintiff's evidence may be likened to a wall, the defendant's testimony may be likened to a battering ram or a force of any kind whose purpose is to overturn and throw down the wall. Let us examine this architectural illustration for a moment. The plaintiff presents his evidence—builds his wall. The defendant thereupon, instead of seeking to overthrow the wall, says to the supervising architect, (the court): "that wall is too weak to support the cap or coping stones, (the verdict) and I should not be called upon to throw it down; I ask you to examine the wall, its foundation, the material of which it is made, the cement used to hold the stones in place and everything connected with it, and say, as matter of fact, after such inspection, that the wall will not support the cap stones." Under the Scintilla Rule the answer of the court would be, "there is a tribunal provided by organic law to do the thing you ask me to do. There is a wall here of some kind; it may be out of plumb; it may be weak, *but it is for all that a wall,* and it may support the cap stones. Its sufficiency or strength I may not, however, determine, for I am no better, and perhaps not as well qualified to perform that service as the tribunal provided for that especial purpose. To reach the conclusion your request assumes, I would have to hold that there exists *no wall,* or I would be forced to deduce and infer propositions which I might percieve to be true, but only because of their connection with known facts. To illustrate, it was held in 50 O. S. 143, that 'negligence is always an inference from facts put in evidence, as contrasted with a fact which is the subject of direct proof. The proof disclosed facts calling for *logical* as distinct from legal deduction. Where that is the case, the question is for the jury and not for the court.' In the case before us, there being in fact some kind of a wall, its strength and sufficiency is an inference or deduction from known facts—subject of direct proof, such as the

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height and base of the wall, the material of which it is composed and the manner of its construction. The ruling you ask, calls for a logical as distinct from a legal deduction from these disclosed facts—an inference and deduction I am not permitted to draw." Suppose, for the sake of the argument, we reverse the rule contended for by the Federalists. If, in a given case, the defendant joins issues with the plaintiff, can the latter say the defendant's evidence must be withdrawn from the jury, because, as matter of law, it does not amount to a defense? If the plaintiff must have a preponderance of evidence before he can go to the jury, surely, by a parity of reasoning, the defendant has no right to have his case submitted to the jury unless there is a preponderance of evidence in his favor. This doctrine is not without authority, for it was so held in 54 Wis. 433, 439. It is said that North Carolina and Ohio are the only states where the Scintilla Rule is in force. Let us see: Where "there is *any* testimony, from which the jury can reasonably conclude that the facts sought to be proven are established," the case must go to the jury. 43 N. J. L. 596. "A non-suit will not be granted where the evidence offered *tends* to show facts sufficient to support the action, *although remotely.* 18 Me. 380. Nor will a non-suit be granted "where there is *any* evidence at all for the plaintiff, proper to go to the jury." 6 Iowa, 476; 79 Me. 477. "Nor will a non-suit be granted on the ground of the insufficiency of the evidence to warrant a verdict for the plaintiff." 3 Kan. 295; 36 Mo. 202. These citations could be vastly augmented, were it necessary. The Encyclopedia of Law is everywhere recognized as a standard work and legal authority. In the text, Vol. 16, page 741, this authority says, "but where there is *any* evidence for the plaintiff, it is improper to grant a non-suit, and to the plaintiff's evidence must be given the most favorable construction." This is as near the Scintilla Rule as the author could come unless he quoted it literally.

The language of Mr. Justice Miller in Pleasants vs. Fant, 22 Wall, 116, should be read in connection with the more recent and matured utterances of that distinguished and able jurist. Pleasants vs. Fant was decided in December, 1874. Thirteen years thereafter, in September, 1887, he wrote a paper on "The System of Trial by Jury," which I believe was read before the National Bar Association. It can be found in Vol. 21, p. 861 of the American Law Review. In this paper Justice Miller freely admits that before he became a Supreme Court Justice, he believed "the jury system was one of doubtful utility." His theory, while a practitioner, was a court of three or more judges, selected from different parts of a district or circuit. But these views underwent a decided change. He says, in 1887, in the paper above mentioned, "An experience of twenty-five years on the bench * * * has satisfied me that when the principles above stated are faithfully

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applied by the court in a jury trial, and the jury is a fair one, as a method of ascertaining the truth in regard to disputed questions of fact, a jury is in the main as valuable *as an equal number of judges would be, or any less number*. And I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law, and how *often they disagree in regard to questions of fact.*" The truth is, the judicial mind cannot reason on facts or infer or deduce truth from facts as well as the ordinary intelligent man, who sees things, from perhaps a lower intellectual plane, as they really are, and who understand human nature, because he is more in contact with it, as it really is. To show still further the change in Justice Miller's views I quote again from, "The System of Trial by Jury;" "the court has the right, after the verdict of the jury has been given, to set it aside on the ground that the jury has disregarded the law of the case, and in cases of *gross* disregard of the weight of the evidence, also." In other words, he would not set aside the verdict of the jury because it was against the weight of the evidence, unless it was glaringly and flagrantly so. This is pretty close to the Ohio doctrine. Chief Justice Taney has left for the careful consideration of all who sneer at Trial by Jury, his deliberate judgment that our liberties are inseparably connected with the preservation "in full vigor and usefulness, of the great principles of the Common Law and Trial by Jury." Of course the Federalists say they are in favor of the Jury System. Yes, but they want to so encroach upon its province and to so restrict and emasculate its functions, as to render it practically useless as a means of discovering truth in regard to disputed questions of fact. They want one eye of the jury now; next, they will demand the other eye—then its head. I have, during the last quarter of a century, tried many hundreds of jury cases, and can truthfully say that in my opinion, at least, ninety-eight per cent of the verdicts were right, or pretty nearly so. Of the remaining two per cent, one per cent were radically and viciously wrong, because of corporate tampering with the jury. But the life of the jury fixer as such is short. He either finds himself in jail, or sinks into oblivion, or shrinks into contemptible nothingness as soon as the public discovers and sees him as he really is, a common thief. The Bench and Bar eventually, and in all cases, unearth and punish this nefarious practice. We have had some of it in this city, but to minimize the evil, it will not be necessary to erect a monument to commemorate the last words of Marmion.

Mr. Troup seems alarmed at the expense to which litigants and the public are subjected by the Scintilla Rule. The frequent new trials, reversals in the Circuit Court and trials again in the Common Pleas, furnish reasons, he thinks, why the rule should be abolished. He has

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apparently overlooked the fact that Section 5306, Revised Statutes, of Ohio, was, last year, so amended as to read: "The same court shall not grant more than *one new trial* on the weight of the evidence against the same party in the same case." This is the answer of the people of Ohio, so far as they have answered, to the senseless demand of corporation lawyers for the abrogation of the Scintilla Rule. One of the strongest arguments in favor of the rule in Ohio is, that, as Judge Ranney said in 4 O. S. 647, "A non-suit puts him, (the plaintiff) out of court and charges him with the costs." Under the Common Law, a non-suit is not a decision on the merits. The plaintiff may begin his suit again and strengthen it if he can, at the succeeding trial. In Ohio, this is not the law.. Section 5314 Ohio Statutes provides when an action may be dismissed without prejudice. After enumerating the instances or conditions under which an action may be dismissed without prejudice to a future action, (a non-suit is not among them), the Statute provides that "in all other cases the decision must be upon the merits, upon the trial of the action." This Statute was construed in 24 O. S. 83. The court say, in the syllabus, "under the Act of April 12, 1858, (Section 5314) the court is authorized, in a proper case, to arrest the testimony from the jury, and render a judgment for the defendant. The judgment in such case, however, *has not the effect of a non-suit at Common Law*, but is, under the provisions of the code above referred to, a *decision of the action upon the merits.*" A non-suit in Ohio puts the plaintiff absolutely out of court unless he is able, financially, to pay for a record and have the action of the trial judge reviewed. To do this he must, in advance, secure the services of a stenographer. If his side of the case lasts several days, as is often the case, a record may cost him over $150. It is unnecessary to say that there are but few plaintiffs who bring suits against corporations, that can command that amount of money, so that the non-suit is in reality, if improperly granted, a denial of justice. The corporation first maims and disables the man and thus prevents him from earning money, and, because he is penniless, it then wants to juggle him out of court and out of his legal rights. In the Federal courts a non-suit is not a decision on the merits, and this may have had some influence with Justice Miler in adopting the English rule in Pleasants vs. Fant, for he says, page 122, "in such case the party can submit to a non-suit and try his case again if he can strengthen it." Let it also be remembered that the English rule, itself, obtains in a jurisdiction where a non-suit is not a decision on the merits.

In closing this article, a few pointed illustrations may not be inappropriate. A short time ago the Circuit Court of this county in a case in which I was interested, reversed a judgment and ordered a new trial because the verdict was against the weight of the evidence. I

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asked the Court to make a finding to the effect that there was *no* evidence to sustain the verdict. Being asked why I made such a request, I replied that I wanted to review the action of the Circuit Court in the Supreme Court. My request was refused. I then said I did not think I could strengthen the case on a new trial, and that my client was remediless unless I was permitted to review the holding of the Circuit Court. One of the judges replied to this observation, that they did not always disagree with the jury. In other words, I was told that if the jury again found for my client, the Court might not disturb the verdict. This illustrates, first, the difficulty in having your case reviewed, and secondly, the serious consequences of the courts disagreeing with a jury, except where the right to do so is clear, palpable and manifest.

Some years ago, after the Act of April 1st, 1890, 87 O. L. 150, I tried a case for a railroad fireman who was permanently injured through the negligence of the engineer and conductor of another train. My client was non-suited because the court held he was not in a "separate branch or department" from the engineer and conductor, the three being in the service of the same company. I was morally certain the trial judge was wrong, but I was powerless. My client did not have a cent. He was thrown out of court by a decision on the merits. He was unable to pay for a record and have the action of the trial judge reviewed. Within a year thereafter the Supreme Court in Railroad Company vs. Margrat, 51 O. S. 130 held, in a case involving the same question, that the trial judge committed error. Of what use was this construction of the law to the poor, unfortunate, crippled fireman who was put out of court by an erroneous ruling? It only shows the serious and dangerous consequences that may follow when a court non-suits a plaintiff. It shows more, it shows the danger of removing the Scintilla Rule brake from the Judicial Car. I know of a case that has been tried three times, each trial resulting in a verdict for the plaintiff. Thirty-six more than fairly intelligent, good, honest men, have said the defendant was liable. Two judges have thought differently. The question arises, is the consensus of the judgment of thirty-six men of less value upon a question of fact, than the opinion of one man? The intelligent, able judge, a student of philosophy and other sciences as well as law, does not look at common, every-day occurrences and facts as does the ordinary man. The judge reasons in a sphere and from premises unknown to the great majority of people. He is not as well fitted as the less intelligent man to judge of facts, incidents and daily occurrences that are within the environment of the ordinary citizen, who rubs against, comes in contact with and who is daily, in various ways, intimately associated with the facts, incidents and occurrences that make up the sum total of human existence. To put it differently, I take it that a machinist or a carpenter on a jury would be better qualified to pass judgment upon defects in

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a machine or a scaffold, than a judge who spends more time reading books than he does in examining machines or scaffolds. My views on this matter are not based upon fears of the rulings of mentally robust and honest judges. When a judge of this character non-suits my client, as has sometimes happened, I know that the ruling, whether right or wrong, was honest and disinterested, and for that reason, may have been sounder than my reasoning, clouded, as it was, by the lawyer's bias. But within a very few years there has broken into the judiciary and, like a rocket on a dark night, burst upon our view, as the result of Machiavellian politics, the fin-de-siecle judge, the man, who, in his own conceit, knows all things, whose depths of knowledge no plummet of science or law can sound, who courts favor and influence in every quarter, high or low, and who transforms the bench into a hustings. I fear this man, and what is worse I fear there are a great many of him yet to come. I don't want him given free rein; I want him curbed and restrained by all the wise rules of practice, all the solid precedents that have come down to us from the golden days of Ohio's jurisprudence. Among these is the Scintiila Rule. It is admitted that it is peculiarly an Ohio rule, I say with Judge Ranney: "if there is anything eminently and exclusively our own, it is our system of judicial procedure, and while an enlightened policy would require us to consult other systems when constructing one for ourselves, they ought never to be received to prevent the application of rules and principles which we have deliberately adopted, and applied for such a length of time as to give them general notoriety." 4 O. S. 645.

M. A. FORAN.

The New Bankruptcy Law.

The word bankrupt is derived from the Latin noun *bancus*, the table or counter of a tradesman or money-changer, and from the Latin participle *ruptus*, broken; and it is the equivalent of the Italian phrase *banco rotto*, a metaphor whereby the broken benches of a trader were used to signify the collapse of his business.

The word may be employed in three different senses. In the popular sense, a bankrupt is any person who is unable to pay his debts. In the commercial sense, a bankrupt is an insolvent trader. In the legal sense, a bankrupt is one who, pursuant to a bankruptcy law, has been judicially declared to be a bankrupt.

The provisions of bankruptcy laws, in general, are twofold:—first, to divide the bankrupt's property among his creditors in equal proportion to their claims, and secondly, to discharge the bankrupt from further liability for the unpaid portions of his debts when such division is completed.

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The propriety of the former provision is manifest. The second provision depends for its justification upon the theory that the public should not be deprived of the benefit of a renewal of industry on the part of bankrupts. It is urged that a person, burdened with debts to satisfy which all his property has been in vain applied, can seldom gain a business foothold from which his creditors will not at once drag him down, unless such creditors' hands are effectually tied by a judicial annulment of their claims. And it is further urged that such annulment works little injustice to a bankrupt's creditors, for, if the claims were not discharged, the bankrupt would seldom become able to pay them; and it is of no practical importance to the claimant whether his debtor is willing but not able to pay his debts, or able but not willing, so long as he is execution proof. This taking of private property is thus defensible only on the ground of public policy, and not on the ground that a bankrupt's life should be made pleasant at the expense of his creditors.

To insure as far as possible the furtherance of this public interest in all cases where advantage is taken of bankruptcy laws, it is common to provide first, that a fraudulent debtor shall not be discharged, inasmuch as the renewed industry of such a person would more often consist in plundering than in serving the public; secondly, that a portion at least of the creditors shall consent to the discharge, and thirdly, (in France) that certain civil privileges of the debtor shall be suspended until the debts from which he has received a legal discharge are also discharged in fact. In England until the year 1861, the word bankrupt could apply only to traders, and the word insolvent to non-traders. The estates of bankrupts and insolvents respectively were administered by two distinct courts, known as the Court of Bankruptcy and the Insolvent Court.

Bankruptcy proceedings against a trader unable to pay his debts were involuntary on his part, being instituted by one or more of his creditors. When his property, saving a few minor exemptions, was all applied *pro tanto* to his debts, he was discharged of the balance and began life anew. Insolvent proceedings in the case of non-traders were begun by the voluntary application of the insolvent himself for a judicial division of his property among his creditors, in proportion to their claims. When this was accomplished, he was discharged from imprisonment for debt or liability thereto, but was not discharged from the debts themselves.

Bankruptcy laws have existed in England since the reign of Henry VIII; and insolvent laws existed from the reign of Elizabeth until the passage of the act of 1861, 24 and 25 Vict. c. 134, by which the Insolvent Court was abolished and with it the distinctions between traders and non-traders, voluntary and involuntary petitions, and between the two sorts of discharges.

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In our own country, various bankruptcy laws were enacted in the colonies, and in the Constitution of the United States, Article I, Section 3, it is provided, among other things, that "The Congress shall have power to establish uniform laws on the subject of Bankruptcies throughout the United States."

The interpretations of this provision were two. It was maintained on the one hand that the power conferred was broad enough to include both insolvents and bankrupts as they were formerly distinguished in England. On the other hand, it was urged that the word bankruptcies in the Constitution must be taken to mean just what it had then always meant in the English statutes, for it was solely a statutory word in the sense that implied the right to grant a discharge from debts. And in any other sense, it was argued, the constitutional provision would be impotent. Hence it was contended that only traders could be made amenable to such laws as Congress should enact, and no voluntary petitions could be provided for. The broad interpretation, however, prevailed. Sturgis v. Crowinshield, 4 Wheat. 122.

In the intervals when this power of Congress is disused, there is nothing in the national constitution to prevent the various states from enacting laws to administer the estates of insolvents, except, first, that the obligation of a contract existing at the time of the passage of such a law cannot be impaired by any discharge which it allows, and, secondly, such a law cannot operate beyond the state where it is enacted. There are, of course, no such restrictions upon the laws of Congress.

The Congress has four times exercised its constitutional power to enact bankruptcy laws. The first act on this subject was passed April 4, 1800, and was limited to remain in force for five years, but it proved so unpopular that it did not last that long. In the words of President Adams, it afforded "but too much encouragement to fraud, waste, and a rash spirit of adventure," and it was accordingly repealed Dec. 19, 1803. An effort to pass a second bankrupty act was made in 1840, and, after much opposition, such a law was passed August 19, 1841, to take effect Feb. 1, 1842. It provided for voluntary and involuntary bankruptcy, and was devised as a measure of relief from the mercantile disasters of the panic of 1837. This act in turn was repealed March 3, 1843.

The third act was passed March 2, 1867, amended on June 22, 1874, and again in 1876, and served to clear away the wrecks of the panic of 1873. It was in its turn repealed Aug. 31, 1878. The present act was passed July 1, 1898, and went into effect at once, save that no petition for voluntary bankruptcy could be filed before Aug. 1, and none for involuntary bankruptcy before November 1, 1898. All four acts applied in some degree, to non-traders as well as to traders, and the last three acts provided for voluntary as well as involuntary bankruptcies. The present act is the result of proposals mooted in Congress for several

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years, and finally resulting in a compromise between the two houses. It differs much from its predecessors, being, among other things, far more liberal to debtors, and involving much less costly proceedings. Meeting the opposition of the solvent portion of our commercial world, it will no doubt share the fate of its predecessors, when it has removed from the path of commerce the debris of the great financial crisis of 1893.

The main provisions of the present act are briefly outlined below. Acts of bankruptcy are defined under five heads, including fraudulent disposition of property, preferences given by an insolvent, suffering judgment without satisfying same five days before sale of the property affected, making a general assignment for creditors, and making written admission of insolvency. Any of these acts may be made the basis of proceedings in bankruptcy, to which, however, the solvency at the time the petition is filed, of the person against whom it is filed, shall be a complete defense.

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt," and any natural person, except a wage earner receiving less than $1,500.00 annually, or a person engaged chiefly in farming, and any company, incorporated or otherwise, in part engaged in manufacturing, trading, printing, publishing or mercantile pursuits and owing debts to the amount of One Thousand Dollars, may be adjudged an involuntary bankrupt, but national banks or banks incorporated under state or territorial laws may not become bankrupt.

On the filing of a petition, it is to be passed upon by the district court of the United States, which either adjudges the debtor a bankrupt or dismisses the petition. If the petition is not dismissed, a meeting of the creditors is appointed, and they are to choose one, two or three trustees who hereupon take title to the bankrupt's estate, upon filing bond in amount fixed by the creditors. The bankrupt is entitled to the same exemptions as his state law allows. He can also tender composition with his creditors, which, if endorsed by a majority of them, both in number and amount, is presented to the court and confirmed, unless violative of the law or derogatory to the interests of the creditors. Upon execution of the composition, the bankrupt is discharged and his estate reverts to him.

In the absence of a composition, the trustees administer the estate and on liquidation, divide it amongst the creditors, in dividends, as directed by the referee. Labor claims to the amount of $300.00, for services within three months prior to the filing of the petition, are preferred. The office of referee is permanent, incumbents being appointed by the district judge. Their duty is to pass upon petitions, when the court is not sitting, as well as upon claims; also to examine bankrupts and pre-

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side at the first meeting of the creditors. Each county where the services of a referee is needed is to form at least one district for such appointment.

The advance costs of a bankruptcy proceeding are $25.00, of which amount the referee receives $10.00, the clerk $10.00, and the trustee $5.00. In addition the referee is entitled to one per cent of the amount paid out in dividends, or one-half of one per cent of the amount of a composition, and the trustee has such commissions as may be allowed by the court, not exceeding three per cent on the first $5,000, two per cent on the second $5,000 and one per cent on any further sum.

The bankrupt may ask his discharge at any time after one month from the time of adjudication, and not later than one year, except in special cases where the time is extended six months more. A bankrupt may be discharged even though he has no assets, provided he has not withheld any that he has, except such as are exempt, and provided further that he has not "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books or accounts or records, from which his true condition might be ascertained." Every schedule debt is released by discharge, save taxes and such demands or judgments as are founded on fraud or willful and malicious injuries to the person or property of another.

It has been suggested that incorporated companies, whose principal assets are franchises, may, when overburdened with judgments for personal injuries or otherwise, take advantage of this act, through interested friends, to be discharged of such burdens. It is evident that the law throughout is a debtors' law. The practical effect of the law upon mercantile transactions is such that the ordinary means of recouping anticipated loss will still be pursued, and preferences, attachments, replevin, chattel mortgages, judgment notes, etc., will be resorted to the same as before. It is true that the advantage to be gained by this means may be lost by the institution of bankruptcy proceedings within the succeeding four months, but, on the other hand, if this period elapses without such proceedings, the advantage is more secure, in many instances than before the passage of the present act.

FREDERICK A. HENRY.

The Supreme Court of Illinois has held at the suit of the Attorney General that the Pullman Palace Car Company has exceeded its rights by holding real estate not necessary for the purpose of its legitmate business, and for assuming municipal functions. The offense of the company in this matter consisted in its building and maintaining the town of Pullman, which, as everybody knows, is a town maintained for the residence of the employes of the Pullman Company.

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

We are pleased to note the unusual interest created among the lawyers of Ohio by the article on the Scintilla Rule by Mr. Troup, in our last issue. We publish in the present issue a reply by Hon. M. A. Foran of the Cuyahoga County Bar. Numerous comments have been received by the editors upon the article of last month, from lawyers and judges. In our next issue we will publish them as well as any others received during this month. The question is one of vital interest and is worthy of the attention of all Ohio practitioners. Sooner or later it will come to an issue and a thorough discussion at this time should materially assist in producing a proper decision.

The Joint Traffic Association decision of the Supreme Court in favor of the government has disturbed somewhat the tranquility of the railroads.

The decision was based upon the application of the Sherman Anti-trust law to traffic agreements between railroads to maintain rates. The attempt to break the constitutionality of the law failed and the court declared that "the Anti-trust Act" applies to railroads and it renders illegal all agreements which are in restraint of trade and commerce. The result of this decision will probably be a prompt suspension of the pool, and out of it will grow a new system wherein each tub must stand on its own bottom. The law seems to have now fairly adopted the new principle that under no circumstances may railroads combine to control rates, but it will be strange indeed if some attempt is not made to circumvent the application of this principle.

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The trans-Missouri Association was dissolved immediately after the decision was rendered in that case, but the railroads have gone on doing business nevertheless, and are thriving enough to pay dividends. But the late decision far exceeds in effect the former decision for it is a firm declaration to thirty-two railroad companies which were defendants in the case that they must hereafter depend for existence upon their own independent exertions in competition with each other. Pooling and combination is against public policy and railroads being of a semi-public character come under the mandate of the Supreme Court and the Supreme Law.

Recent Cases.

AGENCY—INDEPENDENT CONTRACTOR—The defendant employed one Tobin under a contract to excavate by blasting rock on former's premises. Through Tobin's negligence, plaintiff, a neighboring owner, was injured. Held, the relation was that of independent contractor and defendant was not liable. Berg v. Parsons, 50 N. E. 957.

The N. Y. court has adopted a rule which amounts to this that an owner can by the giving of a contract to do a known and obviously hazardous work or to do a certain work by a hazardous means shift the responsibility from himself for injury caused by the doing of the work or the means employed to do it. The limit where the court states that the liability cannot be shifted by employing a contractor does not seem large enough and should embrace a case where there was obvious danger in doing the work or doing it in the way designated. The rule in Ohio would seem to be contrary to the principal case, 34 O. S. 638, 4 O. S. 399, 47 O. S. 207, See also 48 O. S. 69. In such cases it seems the owner is under a legal duty to see that the work carried on, on his premises, does not result in injury to his neighbor, but this should not embrace a case where the work is not obviously dangerous, nor one where the contractor chooses a dangerous means of accomplishing the work when the means ordinarily used to effect such work is not dangerous 125 Mass 222.

COMPROMISE—TENDER OF LESS AMOUNT IN SETTLEMENT—Defendant sent plaintiff a check "to cover balance due you and request that you cancel our notes." Plaintiff retained the check and now sues on the notes for a balance, which he claims due after deducting the amount of the check. Held: Plaintiff cannot recover.

Hamilton vs. Stewart, 31 S. E. (Ga.), 184.

The court hold that the defendant must be considered as offering plaintiff the check in settlement, which offer must be accepted or rejected. In this case, it is held that the retention of the amount forwarded coupled with failure to decline the proposition, amounts to conclusive presumption of acceptance. The decision is undoubtedly correct, but must be distinguished from those cases where the amount of the indebtedness is liquidated. In the latter case, if the debtor send a less amount with the stipulation that it be received as payment in full, the creditor may nevertheless retain the same and sue for the remainder. Kromer vs. Heim, 75 N. Y., 574; Day vs. McLea, 22 Q. B. D., 610.

CONSTITUTIONAL LAW—ANTI-SCALPERS LAW—PEOPLE VS. PEASE—Chic. L. J. 504.—An Illinois statute contained the following provision: "That it shall be lawful for any person not possessed of such authority (to wit: a certificate of authority to sell tickets, passes, etc., attested by the corporate seal of a railroad or steamboat mentioned in the first section) so evidenced to sell, barter or transfer for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidence of the holders title to travel on any railroad or steamboat." Held: That this act was unconstitutional.

In the caption the act was declared to be an act "to prevent frauds upon travelers and owners of conveyances for the transportation of passengers." The court holds that the act is not within the police power of the state, and that as it

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appears from the caption of the act that the legislature intended to exercise police power, the act cannot be construed as a regulation of a public business, and further that it is not such a regulation.

The question as to when the limits of the legitimate exercise of the police power have been reached is a very difficult one for the courts to decide. The court was probably right in its conclusion on this point, but did not, it seems, place its decision on the right ground. The law must have some relation to the objects sought in its passage. The legislature is the primary judge whether it has such relation—whether looking at the object sought, the act can be said to be reasonable. With this branch of inquiry the court has nothing to do. It is to inquire whether, not the act, but the legislature was reasonable—can be said to have acted reasonably in the passage of the act. This is a different question than the one before the legislature, and this the court in the present case seems to have overlooked. Of course the court must look at the act to determine whether the legislature did act reasonably, but they often, as here, stop short of the true inquiry, and having come to the conclusion that the act, in their opinion, is not reasonable on that ground alone declare it invalid.

As to the act in question, it is hard to see how any reasonable man could say it had any relation to the objects stated in the caption, and on this ground the conclusion reached by the court seems sound.

CONSTITUTIONAL LAW—State vs. Hawker (N. Y. App.), Alb. L. J. 279.

A case involving very important principles has been recently decided by the New York court of appeals. An act provided that goods made in prison by convict labor should not be sold in the state unless labeled or marked "convict made." The court declared this act unconstitutional because in violation of the commerce clause of the federal constitution and also as interfering with the right to acquire, possess and dispose of property and with the liberty of the individual to earn a living by dealing in articles embraced within the scope of the law. The court also said that it was not within the police power of the state.

We find no difficulty in condemning the policy of such a law, but a far deeper question than mere policy is involved. The court says that the guaranty against depriving the citizen of his liberty includes the right to engage in any lawful business. This may be true, but is a business lawful after it has been forbidden by the legislature? It must be first decided that the business is one which the legislature had no right to forbid, before this provision of the constitution can be made to apply. The court admits that a business may be forbidden when the public good requires it, and then steps into the shoes of the legislature and decides that this business is not of such a kind. This is something the court had no right to do—it is an exclusively legislative question. The court can only inquire whether the legislature can be said to have acted reasonably in deciding that the public welfare required this act, and it is going far to say that they could not have so acted. It may be for the public welfare to destroy one occupation in order that another may be built up, and in such a case the ones immediately affected are not the only ones whose interests are at stake—in a certain sense the entire public is interested in the occupation of each individual.

In regard to the commerce clause of the federal constitution: As an original question it may be doubted whether it would not have been better to have said that this clause conferred on congress a supervising power rather than an exclusive power, but the current of authority has largely set the other way. It can hardly be said, however, in the case in hand that there was any discrimination, inasmuch as the act applied to all convict made goods, and not only to those made in other states. And where there is no discrimination, it is not quite clear how there can be said to be a regulation of commerce among the states.

It seems to us that it is impossible to say that this act cannot be for the public welfare. If this is true then the right of the legislature to enact it as an exercise of the police power cannot be questioned by the courts. If then, it is a valid exercise of the police power, and does not discriminate against the products and commerce of the other states it is not forbidden by the commerce clause of the federal constitution, even on the theory now held by the courts—that that power is exclusively vested in congress.

EVIDENCE-ACCOUNT BOOKS—Plaintiff offered in evidence certain entries in a cash book, which had been made by his bookkeeper. It appeared that plaintiff.

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soon after their entry, verified them by comparison with certain memoranda. Held: The entries are admissible in evidence.

Clarke vs. National Shoe & Leather Bank, 52 N. Y. Suppl. 1064.

The rule laid down in Howard vs. McDonough, 77 N. Y. 592, that if witness has forgotten the facts but testifies that he once knew them, and made a correct memorandum of them at the time, such memorandum is admissible in evidence, is followed in many jurisdictions. The principal case, however, extends the rule somewhat by allowing such memorandum as evidence when made by another than the witness, provided the witness had subsequently verified the same with a recollection of the facts.

FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—Husband made a deed of settlement of land on wife, in accordance with an antenuptial parol agreement. Held: Void against creditors.

Flory vs. Houck, 40 Atl. (Pa.), 482.

The case is in accord with the great weight of authority in this country. Loyd vs. Fulton, 91 U. S. 479: Bump. Fraud §276. But there is good reason for a contrary holding. Hussey vs. Castle, 41 Cal. 239.

LIABILITY OF LANDLORD—DANGEROUS PREMISES—When landlord leaves premises dangerous at the time, and the danger is not patent, but is known to the landlord or could be known to him by exercise of reasonable care and diligence, and could not be accertained by the tenant by exercise of reasonable care and diligence, then the landlord, aside from any liabilities in his contract relations, is liable for injuries resulting from such dangerous premises.

Wilcox vs. Hines, 46 N. W. (Tenn.), 297.

MARRIAGE-VALIDITY-Plaintiff and defendant went on the high seas to be married so as to evade the laws of the state wherein they resided. They immediately returned to their place of residence and lived as man and wife. Held: The marriage was invalid.

Norman vs. Norman, 54 Pac. (Cal.), 143.

The case is a peculiar one, but seems to have been anticipated by Mr. Bishop in his Mar. and Div. §893, §894.

The court says that although the marriage would be valid if solemnized under the laws of a foreign jurisdiction, even if the parties went there in order to evade the laws of their domicile, still there being no law in regard to marriage on the high seas, this marriage is void. Bish. Mar. and Div. §920.

POLITICAL CONVENTIONS — IRREGULAR BALLOT.—Plaintiff seeks to compel defendants, officers of a political convention, to issue him a certificate of nomination. On one of the ballots he had received 249 votes, his opponent 240, total being 3 in excess of the number of members entitled to vote. The tellers so finding, declared the ballot irregular and another is taken and plaintiff is defeated. Held: Plaintiff not entitled to the certificate.

Phillips vs. Gallagher, 76 N. W., (Minn.), 285.

There are comparatively few cases like the above that reach the courts. The court admits the right of a convention to adopt proceedings as it sees fit and if a majority should declare a ballot informal or irregular it can not be questioned in a court of law, unless such action is fraudulent or oppressive. A case involving the latter is People vs. Commissioners, 31 N. Y. Suppl. 112.

Buck, J., vigorously dissents.

PROXIMATE CAUSE OF DEATH—PRESUMPTIONS.—Action under statute by wife for homicide of her husband due to defendant's negligence. Demurrer on ground that over a year and a day having elapsed between the death and the injury, defendant's act was not the cause of the death. Held: Demurrer overruled.

Western & A. R. Co. vs. Boss, 30 S. E (Ga.), 874.

The court simply decides that the rule of criminal law does not apply in a civil suit for the death, or as the statute calls it, "the homicide" of decedent. See also R. R. Co. vs. Clarke, 152 U. S. 230.

TURNTABLE CASE—INJURY TO CHILD—Action for injury to a child through meddling with defendant's turntable. Held: Defendant not liable.

Turess vs. New York S. & W. R. Co., Atl. (N. J.), 614.

Within the last few months several decisions involving the doctrine of the so-called turntable cases have been decided and all of them seem to dispute or limit the doctrine. In the principal case it is flatly denied and the court ex-

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pressly refuses to follow the rule of the federal supreme court. Magie, C. J. delivered a short but pointed opinion, showing to what absurd results such a doctrine, viz: that of implied invitation to children, would lead. It is perhaps largely a question of policy and it would seem that the equities are in favor of a full enjoyment by the land owner of his property. Massachusetts and New York uphold this view. The supreme court of Ohio, though it has never given a direct decision on a turntable case proper, has in a case involving the same doctrine, decided in favor of the child. Harriman vs. R. R. Co. 45 O. S. 11. See also recent case of O'Leary vs. Brooks Elevator Co. 75 N. W. (N. D.) 919.

TRUSTS.—A trustee of money placed the same in a partnership without the knowledge of his cestui qui trust. The firm unlawfully converted the money and was afterwards dissolved by the death of a partner. Held: That the cestui qui trust was entitled to have the amount of the converted fund charged as a preferred demand.

Evangelical Synod of N. A. vs. Schoeneich, 45 N. W. (Mo.), 647.

In this case the trust fund was so mixed with the funds of the partnership, that it had become impossible to trace or identify it. Yet the court held that equity will follow the trust by allowing a preferred claim, as the money was wrongfully mixed. The general rule in this country is to the contrary.

Ohio Digest.

Administrators. Person having right to a distributive share in estate, whose claims are antagonistic to heirs and legatees, is not a proper person to be appointed. 5 O. N. P. 490.

Notice of appointment required of administrator or executor is insufficient if published in a newspaper printed in the German language. 5 O. N. P. 496.

Administrator has no power to borrow money to pay debts of the estate, and if he does so, person loaning must look to him individually for payment. 5 O. N. P. 501.

Assault. Whoever aids in is equally guilty with the one who does the beating. 9 O. C. D. 35.

Appeal. A party sueing for a money judgment does not become entitled to an appeal, because other parties joined with him as plaintiff assert loans. 16 C. C. 432.

Where a court orally announces its general decree and orders counsel to determine exact amounts, which determination is accordingly made and decree in full thereupon entered in journal, decree dates from time of such entry, and appeal must be taken as from that date. 16 C. C. 443.

Appeal bond taken from a Justice of the Peace may be amended. 16 C. C. 448.

Attachment. Will lie on ground of non-residence in an action for unliquidated damages. 7 O. D. 454.

Board of Equalization. May act on complaint or of its own motion. Authority delegated to board may be exercised by a majority of board if all are notified of meeting. 16 C. C. 343.

Need not notify property owner of proposed increase in the valuation of his property as fixed by assessor when increase is caused by erection of new structures. 16 C. C. 343.

May change valuation of property any one year of the ten, provided such change is based on a changed condition of the property. The burden is on property holder to show that property has not changed. 9 O. C. D. 93.

Bonds. Bond may be required by Board of Education independent of the Statute, when bond stipulates that contractor shall pay all claims for labor and material, it may be enforced by laborers or material men. 8 O. C. D. 684.

Direct evidence of intention of parties to bond is inadmissible and intent must be gathered from the language of the bond and the surrounding circumstances. 8 O. C. D. 684.

Building and Loan Association. Where a building association takes mortgage for a loan on lands, which lands mortgagor thereafter assigns to creditors,

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the ass'n is entitled to fines and penalties accruing under terms of mortgage, up to time of its payment. 16 C. C., 452.

Borrowing members of, may make any reasonable compromise as to their liability if it does not amount to inequality or fraud on others; the rule that liability of such members is limited by their right to share in profits is unequal and fraudulent. 9 O. C. D. 74.

Constitutional Law. Act (91 O. L. 376), supplementing §917 Rev. Stat., providing for publication of commissioners reports in counties with population not more than 21,730, nor less than 21,720, was unconstitutional and was repealed by implication by labor act (92 O. L. 188) 9 O. C. D. 90.

Contracts. Verbal contract between father and son whereby latter was to take possession, become owner of certain property bought by father, held: enforceable in equity and, possession being granted to son, not within Statute of Frauds. 16. C. C., 367.

Where father promises to purchase and give to sons certain property to induce son to remain at home, equity well decree specific performance 9 O. C. D. 19.

Corporations. A trustee of a religious corporation cannot pledge the credit of the church: the collective authority of the trustees acting as a board is necessary to bind. 7 O. D., 449.

Creditors. It is not unlawful for a foreign corporation, though insolvent, to make and deliver to a creditor residing in this state a judgment note with intent that a judgment be taken on such note in another state and property there situated be appropriated to its payment. 9 O. C. D. 1.

Devise. To wife without words of limitation, in third clause of a will when preceding and following clauses have devised other property to her for life, construed to convey only a life estate. 9 O. C. D., 19.

Ejectment. Owner of property invaded by a railway may elect to have remedy of ejectment or to compel appropriation. From ejectment no appeal lies. 9 O. C. D. 5.

Equitable Setoff. Bank may set off a deposit against the indebtedness of an insolvent debtor. 8 O. C. D., 682.

Error. Circuit Court will not consider an assignment of error that verdict is excessive as grounds for reversal. 9 O. C. D. 82.

Evidence. Photograph of a testator is inadmissible to prove or disprove capacity. 9 O. C. D. 82.

In contest of a will for undue influence it is competent for plaintiff to introduce a former will granting defendant a much less devise; and defendant in turn may introduce a will of testator's wife made prior to will in suit, in which she devised her property away from defendant. 16 C. C., 386.

Unsupported parol evidence of one person is not sufficient to prove a deed alleged to have been lost; evidence in that behalf must be clear and convincing. 5 O. N. P. 495.

Guaranty. Notice of acceptance is not necessary where guaranty binds surety in a certain sum for goods to be furnished principal. 9 O. C. D. 47.

When guaranty is given to secure a line of credit for merchandise it will be construed as a continuing guaranty and not merely guaranty for first bill sold. 9 O. C. D. 47.

A guaranty for the performance of a voidable contract may be enforced against the guarantors; the principal obligors need not be joined in the action. 5 O. N. P. 480.

Injunction. Circuit Court cannot by injunction or mandamus control publication of legal notices by sheriff. 9 O. C. D. 42.

Insurance. Wherever action to reform policy in equity would lie, plaintiff may sue on policy at law and by pleading by way of estoppel prevent defendant from taking advantage of the fault of the policy. 16 C. C. 413.

Juror. To be of avail misconduct of a juror during trial must be brought to the attention of the court and after verdict cannot be urged as cause for interfering with verdict. 9 O. C. D. 63.

Marriage. The act of 1887, §3108 Rev. Stat., requiring wife under certain circumstances to support husband is applicable to marriage consummated before passage of act. 7 O. D. 433.

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Mayor. Cannot on complaint revoke a license issued by him for a show unless ordinance expressly authorizes him. 16 C. C. 362.

Mortgages. A mortgagee who stands by and sees mortgaged premises sold for taxes so as to give rise to a penalty and then acquires title by assignment of tax certificate, can only recover for the taxes he has paid and for amount called for by certificate without the penalty thereon.

A mortgage to an administrator "his sucessors and assigns" will pass the fee simple estate, when the instrument plainly evidences such to have been the intention and provisions of deed could not be otherwise carried into effect. 16 C. C. 427.

Municipalities. City, having ordered an excavation on a public street which was necessarily dangerous to the public is bound to see that such excavation is properly guarded. 9 O. C. D. 63.

Council has power under §2271 Rev. Stat. to assess property within assessment district whether such property abuts on the improvement or not. 9 O. C. D. 78.

Negligence. When injury is caused by combined negligence of a fellow servant and a superior, the plaintiff may recover. 9 O. C. D. 82.

One having actual knowledge of danger to which another has negligently exposed himself is bound to act with reference to such knowledge; this rule is not applicable in cases where one "ought to have known" as no such duty exists. 9 O. C. D 51.

Where a brakeman is injured through fault of a fellow-brakeman, the company is not liable. 16 C. C. 377.

Brakeman is not required to inspect appliances of his train where inspectors are provided for that purpose, although such inspectors are fellow servants of brakeman, company will not be excused where insufficiency of inspection is caused by shortness of the time allowed therefor, of which fact officers of company have previous knowledge. 16 C. C. 377.

Brakeman employed on a run for two years presumed to have knowledge of danger incident to passing under a certain bridge and is guilty of contributory negligence in not taking care to avoid collision with such bridge. 9 O. C. D. 9.

Pleading and Practice. Failure of plaintiff to reply to a plea of justification by defendant is not to his prejudice. 9 O. C. D., 35.

Where plaintiff in personal injury case alleges negligence on two different grounds, and one allegation is thrown out by special findings of jury, case may proceed and plaintiff recover on the other allegation. 9 O. C. D. 82.

To sustain an action brought under §6448 Rev. Stat. to compel a corporation to appropriate property of which it has taken unlawful possession, plaintiff must be legal owner. 5 O. N. P. 497.

Probate Court. Where an assignee brings action in probate court to sell real estate of his assignor, on cross petition such court has power to reform a mortgage. 5 O. N. P. 487.

Order or finding made by probate court on final account of executor cannot be attacked or set aside in a collateral action. 5 O. N. P. 501.

Promissory Note. An attempted alteration of a non-negotiable note by insertion of the words "or order (sic)" in the wrong place does not make the note negotiable and not therefore such an alteration as renders note invalid. 9 O. C. D. 70.

Railroads. Amount of liability of railroad for taking property of a private owner cannot be limited by liability of city under similar circumstances, although railroad acts by and under authorityof the city. 9 O. C. D., 37.

Relative rights of street cars and other vehicles on tracks of former, and the measure of care required by both, considered. 16 C. C. 393.

Trademark. A geographical name is not ordinarily the subject of a trade mark; but the use of such a name by one not residing or doing business in the locality, to the prejudice of an old-established firm, will be enjoined. 5 O. N. P. 473.

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Usury. Where a life insurance company requires that applicant for a loan take out an insurance policy on his life, such insurance and premiums paid thereon will not be considered as compensation in addition to usual interest, and does not constitute usury. 16 C. C. 434.

But where in like case insurance is taken out by borrower on another's life in which he has no insurable interest, the transaction will be usurious. 16 C. C. 434.

Supreme Court Bar Examinations.

NEGOTIABLE INSTRUMENTS.

1. When, if ever, may the holder of a promissory note recover against an indorser who indorses "without recourse"?

2. (*a*) What is the difference, if any, in effect upon a bill or note, of partial illegality of consideration? (*b*) Of partial failure of consideration? Give reason for answers.

3. A, in his lifetime, made and delivered to B his certain promissory note for $5,000.00, without any consideration. A died, and B brought suit against A's administrators. Can he recover? Give reason for answer.

4. (*a*) Where a promissory note in the form "I promise to pay," etc., is signed by several parties as makers, is the obligation joint or several or both?

(*b*) After the delivery of a joint and several note, the addition of a third person as maker, with the privity of the holder, but without the consent of the original signers, was made. What effect would this have as to the original signers? Give reason for answer.

5. B makes and delivers his non-negotiable promissory note to C, from whom D obtained it by fraud, misrepresentation, and without adequate consideration. The assignee, D, having thus obtained it, transferred it to W, who was a *bona fide* purchaser for value before due, without notice.

Can C reclaim the note from W? Give reason for answer.

6. What effect, if any, has the attaching of a power of attorney to confess judgment to a note, on its negotiability?

If negotiable, how, if at all, would the power of attorney be affected?

EQUITY.

7. (*a*) What are the general grounds for equitable relief?
   (*b*) May personal judgment be given in an equity case?

8. (*a*) Define "Trusts."
   (*b*) What is an "Express Trust"?

9. A, an assignee in trust for the benefit of creditors of B, collects sums of money from time to time and places the same in a bank at interest until such time as the Court orders distribution. Who will be the beneficial owner of the interest which shall accrue?

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10. When will a Court of Chancery allow a deed, absolute on its face, to be shown to be a mortgage?

11. What are the elements which constitute "actual fraud"?

12. (*a*) Name three cases when a Court may appoint a receiver.
(*b*) What Courts in Ohio may appoint a receiver?
(*c*) Who may not be appointed a receiver?

CONTRACTS.

13. In Ohio what contracts must be in writing?

14. Define Novation and give example.

15. The Mayor of an Ohio city is importuned by certain wealthy citizens to enforce the Sunday Liquor Laws. He answers that it would ruin him politically and cause great personal sacrifice in his business, etc. Thereupon the said citizens execute an agreement in writing promising to pay him $5,000.00 at the end of his term of office, if during said term he effectually closed the saloons on Sunday and diligently prosecuted all violations. The Mayor faithfully and successfully carries out his part of the agreement, though at a sacrifice, he being defeated for renomination and otherwise being persecuted and suffering pecuniary loss. Can he recover on the contract? Why?

16. A, doing business in Columbus, orders a load of furniture selected by him from a firm in Pittsburg, Pa., nothing being said as to delivery. The vendor loads the furniture on car and while being switched to position the car and contents are destroyed by wreck. In due time the Pittsburg firm sues A for the agreed value of the goods. Can they recover? Why?

17. Jones, in Columbus, engaged in the laundering business, having a large trade in Ohio and elsewhere, sells out to Brown and contracts and agrees not to enter the said business again in Columbus, or in Franklin County, or in the State of Ohio, or in any other State or Territory in the United States. What would you advise Jones as to his right to enter the business again under this contract?

18. The following message was sent over the Western Union Telegraph Company's line: "Springfield, Mass. John Brown, Columbus, Ohio. Mother is dying, come home at once. James Brown." This message was not delivered to John Brown because of the Telegraph Companys negligence. His mother died and he learned of the fact three months afterwards, and as a result suffered great mental anguish. What are his rights against the Telegraph Company?

19. In 1890 A became indebted to D on an account then due. In 1898 he received a bill of the same with request to pay. A then wrote B a letter reminding him that the account was barred by the Statute of Limitations, but that nevertheless the debt was just and he would pay it, and therefore, he enclosed his note due in thirty days. When due, B sues A on the note. A answers setting up no considerations as his defense. What is the law in this case, and in your reason state fully the legal effect of the Statute of Limitations on a debt?

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Book Reviews.

Selected Cases on the Law of Property in Land. Edited by William A. M. Finch, Professor of Law in Cornell University. Baker, Voorhis & Co., New York.

This book is another instance of the growing conviction that the principles of law can be best evolved by means of what is popularly known as the "case system," but it is not enough that there be merely a collection of cases on the given subject, and that the student peruse those cases. Especially is this true of the law of real property. This branch of the law is not modern, in the sense that some of the other branches are. Many of the rules which the law still enforces had their origin in times of great antiquity, and the reason for their adoption may have long since disappeared, but if their true scope and limitation is to be understood, regard must be had for their history. Other rules have been changed and modified in the course of time, and to fully understand and rightly apply them the change and its reason must be carefully looked at.

No student can be said to *know* the law of real property unless he knows its theory, its growth and its changes—it is not enough to look at the law as it is today. That law is a growth and the growth must be studied. The research must be largely historical in its nature.

In our opinion the book in hand fails to come up to requirements in this respect. It is a collection illustrating the rules of the present law of real property, and in this respect is useful for the practitioner rather than the student. The latter should be taught *principles* not *cases*, and while the principles are taught by means of cases, the fundamental distinction between the two must not be lost sight of. A case is not the *law*, it is merely an application of the law.

Again, the book seems to have a *scattering* effect, instead of a *unifying* effect. The law is really reducible to a few harmonious and consistent principles. It does not consist of a large number of *pieces*. Illustrations are only valuable as side lights whereby the principle underlying them may be studied. The cases are, however, well selected as illustrating the different topics and principles involved, and present the law of today.

F. W. G.

Pamphlets Received.

"Proposed changes in Law of Expert Testimony." G. A. Endlich. Paper read before Pennsylvania Bar Association.

"Easements" Benj. R. Burroughs. Paper read before Illinois Bar Association.

Proceedings of Maine State Bar Association.

Guardian ad Litem, Bev T. Crump. Paper read before Va. State Bar Association.

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THE

Western Reserve Law Journal

Vol. IV DECEMBER, 1898 No. 7

The Scintilla Rule.—A Symposium.

At the request of the editors of this magazine I prepared for its October number what seemed to me a temperate discussion of the question, "Should the Scintilla Rule be Abolished?" Its effect has been something different from what was anticipated. I thought it might elicit from some advocate of the rule a calm and dispassionate presentation of whatever reasons may exist for its continuance. Instead, three gallant knights, Hon. M. A. Foran of Cleveland, Mr. J. A. Flory of Newark, and Mr. O. S. Brumback of Toledo, have donned their armor and rushed into battle as if the very existence of our judicial system depended upon their individual prowess. Mr. Brumback, in the plenitude of his ardor, did not stop to inquire what the controversy is about, but flung to the breeze a banner on which is emblazoned the question, "SHOULD THE PRIMA FACIE RULE BE ABOLISHED?" All three gentlemen lift up their voices in a loud battle song the refrain of which is "Down with corporations and corporation lawyers." They rush headlong into the temple of justice and "smite, hip and thigh," every judge who has dared to say to a jury in any case that the facts proven will not, as a matter of law, sustain a recovery. One of them (Mr. Flory) even goes so far as to accuse such a judge of "sitting there with a free railroad pass in his pocket, given to him by one of the litigants for no other purpose than his official position, that ought, if it does not, burn a hole through his conscience, if he has one." Another (Mr. Foran) declares that he has "tried many hundreds of jury cases" and that of the verdicts "one percent. were radically wrong because of corporate tampering with the jury," whatever that may mean. Just how "corporate tampering with the jury" in one percent., or any percent., of a given number of cases bears upon the merits of the scintilla rule, he does not explain. Nor does he attempt to show how the abrogation of the rule will increase the danger of "corporate tampering with the jury." These gentlemen seem to forget that denunciation of

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their professional brethren and of the judges before whom they practice is not argument. They evidently regard the question under discussion as of great importance. They must and do recognize the fact that lawyers, other than "corporation lawyers," differ about it and that a very large majority of courts wherein Anglo-Saxon jurisprudence is administered, refuse to entertain the rule. It is therefore to be regretted that in their advocacy of the rule they have not chosen broader ground than the well-beaten but narrow path of the personal injury lawyer.

Mr. Brumback does not define the *prima facie rule*, which he says corporation lawyers are seeking to destroy. He leaves us to define it for ourselves, while he selects fragmentary clauses from different sentences in my former article, puts them together in a pile and proceeds to consume them in the fire of his own sarcasm. This may be a pleasant pastime, but it does not enlighten us either as to what he means by the "Prima Facie Rule," or as to the merits which may be claimed for the "scintilla rule."

According to Bouvier's Law Dictionary, vol. 2, p. 370, "prima facie evidence of fact is, in law, sufficient to establish the fact, unless rebutted." We may, therefore, infer that Mr. Brumback's "prima facie rule" is a rule which forbids a judge to direct a verdict for a defendant when the plaintiff produces prima facie evidence of the facts on which he relies for a recovery. I have never heard of "corporation lawyers," or any one else, asking for the abrogation of such a rule. When such a demand shall be made, all right-minded people will stand by the rule. The *scintilla rule* is the one under consideration, and it is the merits of that rule which we would fain have its advocates discuss, if they can calm their fear of "corporations and corporation lawyers" long enough to do so.

Mr. Brumback, in his article, says:

It is called a scintilla rule because it means in the mind of the writer, that where only a scintilla of evidence appears, the case must go to the jury. We deny absolutely that this is the Ohio rule, either in terms or practice." * * * *

"The language of our supreme court in no case says or indicates that a case must go to the jury on such a mere scintilla or surmise of evidence."

If the above denial and declaration be true, there is no scintilla rule to abolish and in that case it is difficult to understand why three intelligent lawyers should occupy so much time and space in denouncing those who favor its abolishment. The mere statement that the rule does not exist would, if true, be sufficient answer to all arguments against it. But let us "test by the book" the correctness of Mr. Brum-

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back's statements above quoted. In Sperry vs. Johnson, 11 Ohio, p. 452, Justice Read says at p. 453:

"The court never directs a non suit if there be *any* competent evidence to support the issue. The competence of evidence is with the court, its effect with the jury. The court will never presume to decide upon its sufficiency, *however slight it may be*; this is for the jury."

In Ellis vs. Trust Company, 4 O. St. 628, Justice Ranney says, at p. 647, in speaking of a motion to direct a verdict:

"The motion involves not only an admission of the truth of the evidence, but the existence of all the facts which the evidence conduces to prove. It thus concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of action has been supported by *some* evidence. If it has, *no matter how slight it may have been*, the motion must be denied."

The above case is cited with approval in the case of Ry. Co. vs. Snell, 54 O. St. 197, 201. On page 202 Justice Spear says:

"Applying the doctrine of that case, the motion involved an admission of all the facts which the evidence *in any degree* tended to prove, and presented only a question of law, whether each fact indispensable to the right of action and put in issue by the pleadings has been supported by *some* evidence. If it has, *no matter how slight the evidence*, the motion should have been denied, because it was the right of the plaintiff to have the weight and sufficiency of his evidence passed upon by the jury."

The above quotations show that when Mr. Brumback declares that the "scintilla rule" does not exist in Ohio, he raises a question of fact between himself and the supreme court, and that there is rather more than a scintilla of evidence in favor of the court.

Mr. Flory, in his contribution to the discussion, says the rule does exist in Ohio and that the definition of it in my former article is correct. He then adds:

"But who is to decide when and how much the evidence tends to prove each material fact? To decide this requires the scrutiny of evidence, the construction and inferences to be drawn from it, the credibility to be given to the witness, and the application of them all to the general knowledge and observation of mankind under like conditions and circumstances possessed by the judges or jury that decide the facts. There is no difference between the sufficiency of proof and the tendency of it, only in the amount and degree and somebody has to decide when the dividing line is reached."

Mr. Flory then proceeds to argue that this question of the tendency and sufficiency of the evidence should be left to the jury, because, with their practical knowledge, experience and sagacity, they are better fitted to decide it than a judge. That is to say, twelve men, of good character to be sure, but selected at random from the community without reference to education or training, are better fitted to decide upon the tendency, and hence the admissibility, of proof than a man whose life

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has been spent in studying and applying the principles and rules of evidence. The legitimate conclusion is that the judge must submit the case to the jury, no matter what the evidence tends to prove, whether it tends to prove the facts in issue, or something altogether irrelevant to the issue. This goes even beyond the limitations of the scintilla rule and sets at naught the uniform decisions of the courts where it obtains. Those courts all hold, not only that there must be some evidence, but some evidence tending to *prove the material facts in issue*; that it is the province of the judge to decide whether *any* evidence so tending has been introduced and, if not, to direct a verdict. It is difficult to believe that Mr. Flory means what his language declares and implies. But he seems to reach the climax of his argument and of his eloquence when he exclaims:

"Who, I repeat, is best able to decide the tendency and weight of the evidence, draw conclusions, and make the verdict, this one man, possessed of all the weaknesses, prejudices and passions that each of the jurymen have, or the jury, the combination of twelve minds, who, after mature deliberation, are each as capable of arriving at the truth as the judge?"

That is to say, the safest and best tribunal to decide even the *tendency* of the evidence is that in which "all the weaknesses, prejudices and passions" of one man are multiplied by twelve. One may well dispair of answering such an argument and I freely confess my inability to cope with it.

The same writer declares that the State Bar Association is opposed to abrogating the scintilla rule. He says:

"Notwithstanding the corporation attorneys were there in full force, the way the proposition to abolish this so-called rule was sat down upon by the association showed that the rank and file of the legal profession still believe that this is a government of the people, for the people and by the people, that in this day of education and printing presses, the people are still better able to decide the questions of fact between litigants than the centralized judge, who has the same feelings and weaknesses in his religion, his politics, his views and prejudices as the common run of people."

The writer appears to labor under some confusion of mind as to the facts as well as ideas. I do not know whether he was present at the meeting or not. All who were present and comprehended the proceedings know that when the discussion of this question had consumed all the time which could be devoted to it, and there appearing to be a desire to discuss it further, a member moved to postpone the further discussion of it until the next meeting and that the motion carried without dissent. So it is not true that the association "sat down" upon the proposition to abrogate the rule.

I do not care to use a "deadly parallel," or any other weapon or amunition, to discuss with Mr. Foran the form of the scintilla rule.

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Clothe it in what language he will, the principle has been too often and too clearly stated by our supreme court to permit of any doubt of what it means in practice. It means that when there is any evidence, " no matter how slight," tending "in any degree" to support the several material facts in issue, the trial judge may not pass upon its sufficiency until after verdict. Such is the rule. The only question is whether the rule is a good one and ought to be continued, or a bad one and ought to be abolished.

All three of my worthy opponents in this discussion declare that the rule ought not to be abolished because the effort to secure its abolishment is a covert attack upon the right of trial by jury. Mr. Foran says: "They (the opponents of the rule) want one eye of the jury now; next they will demand the other eye—then its head." This statement is but another resort to a ruse commonly adopted by persons in an indefensible position, of trying to direct attention to some other person or object. No one, "corporation lawyer" nor any one else, so far as I know, desires to deface in any degree this grandest of all the monuments of Anglo-Saxon jurisprudence. It is not a question of abolishing, or even curtailing the right of trial by jury when there is anything for the jury to try. It is not even a question of avoiding a formal submission of a case to the jury when there is nothing to try. It is only a question of the right of a judge to say to the jury before verdict, what is by statute both his right and duty to say after verdict, if the verdict be not sustained by sufficient evidence, "this evidence is not sufficient to sustain a judgment and your verdict should be for the other party."

Only two grounds worthy of serious consideration have ever been taken by the advocates of the *scintilla rule.* One is the constitutional ground taken by Judge Ranney in the case already cited. The other is the ground, "stare decisis." Neither of the three gentlemen to whom I am replying have even attempted to discuss either of these grounds. As to the first, they merely pronounce the revered name of Judge Ranney and exclaim "*ipse dixit.*" None will dispute the ability and learning of Judge Ranney. His name will shed luster upon Ohio reports so long as they are known in the literature of the profession, even as the names of Aristotle, Socrates and Plato illumine the history of philosophy. Yet, who will deny that the systems of philosophy advocated by these great thinkers have given place to sounder and better systems? Is it a reflection upon the great Jewish law-giver that his system has been modified and largely supplanted by another system of a later era? Will it dim the luster of Judge Ranney's name and fame if changed conditions require a modified or different mode of procedure? Is the science of jurisprudence to be a stationary science in Ohio alone? Is it to be eternally and immovably fettered by the maxim *stare decisis?* It has not been so as to other matters. Why should it be so as to the

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scintilla rule? Time was when a married woman had practically no legal existence separate and apart from that of her husband. The rule *stare decisis* has not prevented her almost complete emancipation from former disabilities, and the courts were in advance of the legislature in the forward movement. Mr. Foran says the scintilla rule is as old as our jurisprudence. So was the doctrine of courtesy, but we have survived its relegation to the archives of history. For fifty years the supreme court of the United States declared that admirality and maritime jurisdiction could not be exercised over inland waters beyond the ebb and flow of the tide. This doctrine was declared, over and over again, from a bench adorned at the time by such names as John Marshall and Joseph Story. When the absurdity of the doctrine was finally discovered, the rule *stare decisis* did not save it from extinction. But why multiply examples? Those already given suffice to show that even time-honored rules of law do not withstand the current of progress.

Too much praise cannot be given to the bench and bar as great conservative powers in the history of our civilization. To their protection has ever been confided the rights held dearest by mankind, and seldom has either bench or bar abused the trust.

Most members of the profession, whether on the bench or at the bar, are capable of entertaining and do entertain correct conceptions of private and public rights and obligations. Yet there are found in nearly every local bar some whose only criterion of right is self-interest, and in whose code of ethics the end justifies the means. They have flooded the dockets of the courts with personal injury cases to an extent that may well arouse grave apprehension in the business world. I do not deprecate the prosecution of a personal injury case wherein the plaintiff has a meritorious cause of action. I only deprecate the flood of cases without merit, which crowd the dockets and occupies the time of our courts. The lawyers who bring and prosecute these cases are unanimously and clamorously in favor of the *scintilla rule*. It is the chief anchor of their hope. Without it their occupation would be practically ended. They not only clamor for its continuance, but they are coöperating to increase its usefulness for their own purposes. In the late legislature of Ohio they procured the passage of a law forbidding the same court to grant more than one new trial in the same case on the ground that the verdict is not sustained by sufficient evidence. Some of them are now advocating a change in the jury system which, if effected, would make the agreement of seven the verdict of the twelve. Without the *scintilla rule*, these changes, attained and contemplated, would be of comparatively little consequence. With the rule, they are fraught with grave dangers which the courts would be nearly, if not quite, powerless to prevent. It still seems to me that there is no good

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reason why the rule should be continued and that justice and expediency call for its abrogation. JAMES O. TROUP.

Bowling Green, O.

* * *

Dear Sir:—The last legislature enacted a law having an important bearing on the scintilla rule; it is found in vol. 93, Ohio laws, p. 217, and reads as follows:

"The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case."

Suppose a verdict is set aside because clearly against the evidence, although supported by such an iota of proof as, under the scintilla rule, prevented a non suit. The case is tried again with a verdict for the same party upon precisely the same facts. What then? Why, under this new statute, the motion for a new trial must be overruled by the court, and judgment rendered on the verdict, which is contrary to, and against the evidence. In other words, the verdict upon which the judgment rests does not embody the facts proven on the trial. Any one can see that this is a burlesque on justice, yet it is unavoidable.

Under the scintilla rule the court has no power to grant a non suit if the claim has even a spark, a tittle, a particle of proof to support it. Under the statute, the court, having once granted a new trial on the weight of the evidence, is powerless to do so again and must enter up judgment for the wrong party upon an unjust verdict. This is judicial robbery, legal plunder, lawful violation of the sacred rights of property.

Cleveland, O. A. T. BREWER.

* * *

Dear Sir:—I would feel some hesitation in changing the law to allow the court to take cases from the jury whenever the court was of the opinion that the amount of evidence in the case reached only what is denominated a "scintilla."

It quite often happens that evidence and witnesses impress different minds differently; but I am not sure that in all kinds and classes of cases one judge is more certain to be right on questions of fact than twelve men.

Doubtless that might sometimes be true, but in such case, when it is clear twelve have made an error, it can be corrected by the judge, as the law now stands. It will naturally challenge the careful consideration of a good judge, when he overrules the verdict of the twelve, while he might act more hastily and not always so considerately if he decides the case on the weight of evidence before the jury have had the privilege. Yours truly, E. J. BLANDIN.

Cleveland, O.

* * *

My Dear Sir:—I am in receipt of your very kind letter of the 14th inst., in reference to the scintilla rule, upon which the Western Reserve

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Law Journal contains so able an article in favor of its abrogation. Mr. Troup has presented his views (in which I concur) in so clear and forcible a manner, that I am sure I can add nothing of weight to what he has written. Very respectfully yours, F. J. DICKMAN.

* * *

Dear Sir:—I am in receipt of your favor of the 11th inst., and also of the copy of the Journal, containing the argument by Mr. James Troup, to which your letter refers. I have read the article with interest and care, and regard it as an admirable argument in favor of abolition of the *scintilla rule*. I have long felt that the rule was not founded in good reason. It seems to me an absurdity for a judge to be unable to direct a verdict in a case when, at the same time, he knows that if a verdict is rendered in a given way, he will set it aside. In short, the idea that it is error to refuse to direct a verdict where it would be error to let a verdict the other way stand, seems to me to have no good foundation, and the absurdity is well stated in this article of Mr. Troup's. I am glad the matter is being agitated by the bar and in the law journal. Yours truly,

Circuit Court of Ohio, Eighth District. U. L. MARVIN.

* * *

My Dear Sir:—It will be impossible for me at this time to formulate my views on the question referred to. I am not indifferent, however, to this very interesting and important question and trust that a full discussion, pro and con, will result in the abolition, or at least, a modification of the so-called scintilla rule. Very truly yours,

J. W. SCHAUFELBERGER.

Court of Common Pleas, Tenth Judicial District.

* * *

Dear Sir:—It is seriously contended by a large number, mostly representatives of corporate wealth and power, that this right should be substantially abrogated, that, alhtough schools have been established in every corner of the state, education has become almost universal, printing presses have multiplied to such an extent that newspapers enter almost every home, so that the masses of the people were never before as thoroughly educated as now, it is now contended by these representative attorneys for corporations, that the people are not capable of deciding the questions of fact, but that it should be taken from them and conferred on one man sitting as a judge, upon motion of one party, and without time for consideration and deliberation. He is to decide the questions of fact; it should be taken from the twelve men and given to the one to consider the conditions and circumstances surrounding the case, draw all inferences from the evidence, pass upon the credibility of witnesses, and himself decide, not only when the evidence "tends" to

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establish the truth of a fact, but, to go further and decide when that tendency amounts to a "sufficiency" of proof to convince his mind that a fact is proved. They want this decision of fact taken from these twelve every-day, experienced countrymen, whose minds are required to meet, and conferred upon this one man, who has done nothing but read books all the days of his life, with no actual experience relating to the fact involved, who has all the prejudices and passions of other common people, who, perhaps, has been a corporation lawyer during all the days of his practice, so that his mind is narrowed and warped to this or that particular side, perhaps sitting with a free railroad pass in his pocket, given to him by one of the litigants. They want this and they want it so badly that they forget that this so-called rule is a right secured by the constitution, and say it is only a "rule" established by the court, and that the court should enter upon that iniquitous course of judicial legislation to change it.

No one in the face of the fact that courts are constantly reversing one another upon, not only questions of fact, but upon questions of law that the judge is supposed to be specially learned in, will say, that the judge is more capable of arriving at the truth of a fact than twelve just as intelligent men. No body of men know this any better than the members of the legal profession, and I believe that there is no body of men who will be quicker to help hurl from power, whether in legislature or court, the persons who attempt to destroy this bulwark of human liberty, right and property, and establish judicial tyranny by destroying the right of all persons to have their rights growing out of the facts passed upon and decided to the fullest extent by a jury of his peers, than the members of the legal profession. Yours respectfully, J. A. FLORY.

Newark, Ohio.

* * *

My Dear Sir:—I have received Mr. Troup's article which seems to me sound. I have not examined the Ohio cases on the subject, but I can hardly believe that the difference is, at bottom, anything more than a difference over words. If it be, it would be a good thing to bring the matter to the test of a thorough argument in your courts. Yours truly,

Cambridge, Mass. J. B. THAYER.

The statistics of the Ohio divorce courts for the year ending June 30, 1898, furnishes some food for reflection. At the beginning of the year 2961 divorce cases were pending and 4470 suits were instituted during the year, making a total of 7431. Of them 5473 were brought by the wife and only 1958 by the husband, which may be accounted for in some measure by the fact that in Ohio the husband has to pay the costs and attorney's fees in any event, and therefore the wives are more apt to rush into the courts. 3379 applications were granted and 1109 refused, leaving 2943 still pending. Of the various grounds for divorce, absence and neglect of duty, which are classed together, furnishes a total of 3585 cases, and cruelty comes next in numerical order with a total of 1696 cases. Drunkenness was the foundation for 993 suits, and unfaithfulness for 942.—Law Notes.

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The Guardian Ad Litem—His Origin.

The guardian *ad litem*, as commonly understood in our days, has none of the powers and none of the functions of the guardian of an infant, as that term is accepted in the law. A guardian is appointed for an infant, either to have the custody and control of his person, or to have the management of his property. The guardian *ad litem* has neither. He is a person appointed by the court, whether at common law or in equity, to defend and protect the interests of an infant defendant in proceedings to which the infant has been made a party, either because of his interests in the property involved, or because of some specific complaint directed against him. While this is true, the person so appointed has always been denominated a guardian, and such appointment by the courts is mentioned by the earliest law writers.

Those forefathers, as we may justly call them, of the law of ancient Britain, such as Fleta, Granville, Bracton and Britton, devote much space to the treatment of guardians. This arose naturally out of the fact that the law which they were dealing with was mainly feudal law, with its chief features of the tenure of land and service to the knight or lord. The guardian played an important part in those old days, for the reason that the male infant was to have his lands kept for him, so that on reaching age he could continue to render the services that had been rendered by his ancestors to his lord and to his king. Out of this state of affairs arose the parole demurrer—that is, that an infant should not be bound to answer to a suit concerning the land until he became of age, otherwise the land might be lost and his ability to perform services of chivalry thereby impaired.

The guardian in socage and the guardian in chivalry are well known institutions of that age, when might was right. But even in those times it was recognized that an infant might be sued upon certain causes personal to himself, such as assault and battery. Cases of this kind, however, must have been exceedingly rare. In what may be called the first English book on practice, Fitzherbert's "Natura Brevium" (page 27, L), we find the rule laid down as follows:

"An infant shall sue by his *prochein amy*; but if the infant be defendant in any action, he shall make his defense by guardian, and not by *prochein amy*. And the court shall assign the guardian for the infant defendant, and that is commonly one of the officers of the court."

"And the king by his letters patent may make a general guardian for an infant to answer for him in all actions or suits brought or to be brought in all manner of courts. Or may make two or three guardians jointly and severally to answer for him, or to bring an action for him, and at the request of the infant may grant by the said letters patent, that the same make other guardians jointly or severally in their places, to

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sue or defend for the same infant in all actions and suits which are brought or sued, or shall be brought or sued after."

It would appear from this that the appointment of a guardian *ad litem* by the court to protect the interests of the infant defendant is traceable to the institutional English theory that the king, as *parens patriae*, had in special charge the interests of infants, and that the courts, in making such appointments, did so in the exercise of the royal prerogative, converted into a duty.

In Coke's First Institute, and in Bacon's Abridgement, the same general statement is made, though more at length, and with citations of some precedents. In Viner's Abridgement, it is stated: "One cannot answer for an infant as guardian, in chancery or any other court, unless he is assigned by the court."

It is evident that in those early days there was little, if any, difference in the appointment of guardians *ad litem* by the court in chancery and by the common law courts. Indeed, the court in chancery was then but in its beginning, and scarcely yet separated from its early duties of formulating writs for the common law courts, which gave rise to its designation as "*officina brevium.*"

In a very ancient book published in 1653, by William Sheppard, known as "The Faithful Councellor, Or, The Marrow of the Law in English," the practice is said to be that an infant must sue by *prochein amy*, and must defend by guardian—that is, in a court of law. As to suits in chancery, this ancient writer says that an infant may be compelled to answer a bill, and cites a case in the time of 12 Elizabeth, in which an infant was committed to the fleet for disobeying a decree of the chancery court. At this time, therefore, the practice in the growing chancery jurisdiction does not seem to have been finally settled. The writer adds: "The court may also, if it pleaseth, appoint an infant defendant a guardian to defend his suit."

If, at this period, there was any discretion exercised by the court in appointing a special guardian to defend the infant defendant, it must have been abandoned very early afterwards. Indeed, it can scarcely be said that there were at that time any well-defined rules of practice in chancery. A great impetus had then just been given to the business of the chancery court by the learned diligence of Lord Bacon, and it was further stimulated towards the latter part of that century by Lord Heneage Finch.

In the 'Forum Romanum," a treatise upon "The History and Practice of the High Court of Chancery," by Lord Chief Baron Gilbert, in which he is treating of the chancery practice as established about the year 1700 or early in the eighteenth century, I find the following (pp. 204-5):

"No infant can bring a bill but by a *prochein amy*, and he must take

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care of it, for if the bill be dismissed, the *prochein amy* must pay the costs thereof. 1 Strange, 708; 2 Wims., Rep., 297.

"Where a bill is brought against an infant, he must (if in town) appear in court, and have a guardian assigned him, by whom he must defend the suit; if in the country, he sues out a commission to assign a guardian, and put in his answer, and whether he pleads, answers, or demurs, still it must be done by his guardian; for if it is the plea, answer, or demurrer of the infant, without doing it by his guardian, it will be irregular.

"But where the infant neglects to appear, or to have a guardian assigned him, it is a motion, of course (he being in contempt to an attachment) to pray for a messenger to bring him into court, and when he is there, the court always assigns him a guardian; but it is doubted whether this can be done against a peer of the realm, who is an infant, and whose person is sacred."

From this time forward, without exception, so far as I have been able to ascertain, both the common law and chancery courts of England, and then of this country, have unfailingly protected an infant defendant by the appointment of a special guardian to defend him.

It is to be observed that by none of these ancient writers is the special guardian denominated the guardian *ad litem;* and I have been unable to find in any of the earlier writers these words subsequently added designating the special guardian as appointed for the suit—that is, *ad litem.* I have examined such of the cases cited in Coke and Bacon's Abridgment as were within my reach, and in none of them have I been able to discover the use by the courts of the words "*ad litem,*" or any reference to the use of such words in any portion of the records given.

The phrase "*ad litem*" is so familiar to us, and has been for many years, both in England and this country, such a fixed term as designating the special guardian for a suit, that I was struck with this peculiar circumstance. The first instance in which the words *ad litem* are used, so far as I have been able to extend my investigations, occurs in a note to Coke's First Institute, Vol. 1, 171 b. This note was written by Mr. Hargrave, one of the most learned and scholarly lawyers ever produced by England. It is simply used by him in writing his note, apparently as a matter of course, and without attaching any importance to its use.

I have endeavored to ascertain where this phrase came from, and why it was adopted; and submit my conclusions with some diffidence. There must have been in the early part of the eighteenth century some reason for adopting this phrase, or some source from which it was then adopted, and came into use among the English lawyers. The special guardian for an infant had been then a known institution in the practice both in chancery and at common law for many years, and this Latin

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affix had not appeared in any of the ancient and accredited expounders of the law.

Prior to the twelfth year of the reign of Charles II, the guardian in socage and the guardian in chivalry were still recognized, and the Court of Wards and Liveries was the judicial tribunal which dealt to a great extent with the questions touching infants and their guardians, arising out of the feudal tenures. In the year mentioned, a statute was passed removing the Court of Wards and Liveries, substantially doing away with the ancient institutions of guardianship arising out of the feudal tenures, and permitting a father to appoint a guardian. After this the chancery court, as, through its chancellor, the protector of all the infants in the kingdom in the name of the king, acquired a greatly enlarged jurisdiction; and, indeed, the chancery court, by virtue of its peculiar position in English jurisdiction, derived from its original theory that the chancellor acted in the king's name, appointed guardians for infants upon petition. The origin of the power of the chancery court to do this has given rise to an interesting discussion, commenced by a diversity of opinion between Mr. Hargrave and Mr. Fonblanque. Mr. Hargrave, in his note to Coke's First Institute, above mentioned, denied that the jurisdiction of the court of chancery over infants was derived from its exercise of the king's right as *parens patriae*, but that the jurisdiction was in the first instance simply an assumption of power on the part of the chancery court, which, however, by being long recognized, had become part and parcel of the law. Mr. Fonblanque, in his well known treatise on equity, on the other hand, contended for the opposite theory. He alludes to the admitted historical fact that the exercise of chancery jurisdiction had its origin in the onerous burdens cast upon the king by the increasing number of petitions from his subjects. These petitions were referred to the chancellor for adjudication and action, and thus, in the course of time, petitions came to be addressed directly to the chancellor, and the chancery court was created. This being the case, Mr. Fonblanque insisted that the chancery court, from its very beginning, acting for and in the name of the king, had the right to do what the king could do; and, therefore, acting as *parens patriae*, had complete control over all matters relating to infants and their property. This controversy was decided by Lord Chancellor Eldon in favor of the theory of Mr. Fonblanque, in the celebrated case of *DeManneville* v. *DeManneville*, reported in 10 Vesey, 51. The statement of the law by Lord Eldon has been accepted by later writers on equity jurisprudence, including Mr. Spence (1 Eq. Juris., p. 614) and our own Story (Vol. II, sec. 1333). And see Judge Staples' remarks in *Daviett* v. *Davis*, 24 Grat., at page 313. Mr. Pomeroy, however (Vol. III, sec. 1304), in the exercise of the prevailing critical spirit of the times, rather seems to doubt the correctness of Mr. Fonblanque's position. However this may

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be, it is a pleasing theory to suppose that the crown was the original protector of the helpless infant and transferred the enforcement of this prerogative to the old chancellors; and it is one that it is agreeable to entertain and hold to, whether or not it be a delusion.

After the passage of the statute of 12 Charles II, and during the eighteenth century, when the chancery court rapidly grew in importance and the reports of its decided cases became numerous, it must have been that the learned judges and lawyers of those days, when the chancery business was increasing, paid much attention to the framing and shaping of the pleadings and records in chancery. It is well known that the Roman law at that time, or soon afterwards, was being much studied, both on the Continent and in England, and that many of the doctrines in equity jurisprudence were drawn from that source.

Indeed, this was true both of the common law and equity branches of jurisprudence. Lord Chief Justice Holt, in his great opinion in *Coggs* v. *Barnard* (2 Raymond, 909), delivered in 1710, drew nearly all of his terms, and much of his reasoning from the civil law. When Lord Mansfield was made Chief Justice, in 1756, he brought to that exalted position the most vigorous intellect and the highest attainments which have illumined the pages of England's judicial history. He was a deep student of the Roman law, and had thoroughly mastered its principles, and in his long and memorable career upon the bench he engrafted upon the English law many principles drawn from that splendid monument of human wisdom.

On the equity side of the law, after the accession to the bench of Lord Somers, who became Lord Chancellor in 1693, the study and use of the doctrines of the civil law became constant.

From the "Forum Romanum" of Lord Gilbert, and other earlier books dealing with the pleadings and practice in English chancery, it is manifest that the terms used in the chancery practice and the language used in the pleadings were, to a great extent, drawn from the later Roman law.

Such being the fact, upon turning to the later Roman law, particularly to the Codex and the Novels of Justinian, which contain the rules of law authoritatively promulgated after the compilation of the Institutes and Pandects, we find the scource from which the chancery lawyers drew much of their learning.

In the early Roman law, the tutor was the guardian of the infant up to the age of puberty—that is, fourteen years. The curator was a guardian managing an infant's property up to majority—that is twenty-five years of age. In the course of time the distinction between these two was lost sight of, and in the later classical Roman law the terms tutor and curator are often used as synonymous. The first mention made of a special guardian for a suit in the Roman law occurs where a

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controversy arose between the regular guardian and the *pupillus*, or ward. Such a guardian belonged to a class called "*tutor datus*," being the guardian given or appointed for special reasons. In Justinian's Code or the Codex, book V, title 44, entitled, "*de in litem dando tutore vel curatore*," provision is made for the appointment of special guardians to defend the interests of an infant in litigation. In that title provision is made for the appointment of a guardian "*in litem*—that is, in a suit for the purpose of defending the interests of an infant. Among other guardians designated is one denominated as "*ad litem datus tutor*" —that is, the guardian given or appointed *ad litem*. We there find the expression now so familiar to the profession, and I trust I am not departing from the facts of juridical history in reaching the conclusion that we have traced it to its original source.

During the eighteenth century, as the business in the chancery courts grew in volume, the guardian *ad litem* became more and more a familiar figure. While the general rule was, both at law and in equity, that such a guardian was appointed only to an infant defendant, yet occasionally the reports show instances in which an infant plaintiff sued by a guardian specially assigned to him for that purpose, instead of by the *prochein amy*. But the invariable practice was that the infant, as defendant, could only appear by the guardian.

It would be tiresome and out of place here to call attention in detail to the English cases touching the various questions of practice which arose from time to time concerning the guardian *ad litem*. It became well settled that the infant had to be served with process, or otherwise properly brought before the court like any other party, before the guardian *ad litem* could be appointed. When appointed, the guardian could be compelled to serve, and whether assigned to an infant plaintiff or an infant defendant, was generally made liable for costs, though some of the books state that the court might reimburse him out of the infant's estate. As late as 1796 a guardian was assigned to an infant plaintiff in a common law case, the result of which was disastrous to the guardian. I refer to *Marnell* v. *Pickmore*, Espinosse's Reports, page 473, in which the infant refusing to pay her attorney, the guardian *ad litem*, was held liable therefore.

The practice of the English courts, and of the earlier courts in this country, are fully stated in the various text books, and it is singular how many questions have arisen out of the apparently simple matter of appointing another person to appear for the infant. Macpherson on Infants, p. 396; Lube's Equity Pleading, p. 29; Reeve's Domestic Relations, chap. 7; Edwards on Parties in Chancery, p. 195; and, of course the later books—Daniel's Chancery Practice, p. 204; 2 Barton's Law

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Practice, p. 306; American and English Encyclopedia of Practice, Vol. X, title Infants.

The guardian *ad litem* seems to have become much more prominent in this county than he has ever been in England. This would naturally follow, because his position and duties, and the results flowing from his appointment, have been affected variously by the statutes of the several states. There are but few general rules of late years applying to the guardian *ad litem*, because the matters relating to his appointment have been regulated by statute, and the statutes in the different states are in many instances very dissimilar. It was held, therefore, by the supreme court of the United States, in *Colt* v. *Colt*, 111 U. S., 566, that the proper method of proceeding against infant defendants, whether by general guardian or guardian *ad litem*, and the matters affecting guardians were questions local to the law of the jurisdiction.

Richmond, Va. REV. T. CRUMP.

Christian Scientists, if their methods are interfered with in this country, will doubtless urge that they are not amenable for their acts because they are merely engaged in a proper exercise of their religious liberty; but we advise them not to lay this flattering unction to their souls. We have no hesitation in saying that such a contention will not be tenable. The Supreme Court of the United States has passed upon this identical question in determining the alleged rights of Mormons to practice polygamy in accordance with the tenets of their religion. That court has pointed out clearly the distinction between "religion" and the *cultus* or form of worship of a particular sect, which are so often confounded. Construing the first amendment of the Constitution, the Supreme Court has declared that it was intended to allow every one to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, "not injurious to the equal rights of others." But the court has emphatically declared: "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation." In view of these expressions we fail to see how Christian Scientists can hope for any immunity from punishment because of the fact that their so-called scientific operations are sanctioned by and constitute a part of their religion.

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

Judge Blandin's speech before the trial committee of the Cleveland Bar Association, while in the performance of his duty in the expulsion proceedings against one of its members, can hardly result in other than good to all concerned. The circumstances surrounding this incident are known to all attorneys in this state and many outside. By some his unqualified arraignment of the Cuyahoga County bench has been criticized as being severe beyond reason. His words may have cut deep where they struck the hardest, but if it has to be done then the end justifies the means. None but the guilty need feel any personal allusions in the judge's remarks.

The conditions which called forth this speech were as unique as they were startling. Few men could have given voice to the remarks Judge Blandin did and then withstand the reaction. Only a long life of spotless honor and integrity is sufficient license to warrant one in swinging the lash with such stinging, unreserving force, and yet it cannot be said that the speaker had at heart any other motive than the welfare and honor of the profession to which he has devoted his whole life.

Judge Blandin knew that the reputation of the bench and bar of this commonwealth had been assailed—that the evidence produced at the trial only tended to weaken the public confidence in the great bulwark of justice. He knew that to bandy words in the face of fact would be jugglery too thin to resist penetration. He knew that to hesitate would be to prove false to the people—to his profession and to himself. When right and wrong are open to choice there is no alternative. He did only what every honorable man, in his position, acting with the fearlessness of conviction to duty, would have felt bound to do. For this

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he deserves the thanks of every citizen whose interests come within the pale of his words, and whose vote for the judges of the future may be cast with intelligence.

* * *

Rarely does the office-holder work harder during his last term than during his first, yet Attorney General Monnett of Ohio seems an exception. This young Bucyrus gladiator, whose persistent, untiring assaults upon the almost impregnable position of the Standard Oil Trust are receiving wide spread attention, has at last, after many years of law and labor, run to earth the most strongly entrenched combination that has ever blessed or cursed the state. It is the beginning of the end, and from now on it will be interesting to watch the final struggle of this corporation, which, by trickery and delay and chicanery of every conceivable sort, has managed to elude the law and for eight years defy the mandate of the supreme court of Ohio. Whether we take the position that trusts are legal or illegal, we cannot find any justification for the contempt of this trust, for the courts of the state.

ANIMALS—FERAE NATURAE.

The supreme court of New York, in the case of *Mullett* v. *Bradley*, decided October 5, 1898, and reported in 53 N. Y. Supp., 781, has held that "Where a sea-lion escaped from its captor's control, on Long Island Sound, and disappeared, until about two weeks afterward, when it was recaptured by a fisherman in the ocean, over 70 miles from the Sound, its original captor lost his right to it, since it had regained its liberty without animus revertendi, though it may not have reached its native place, or one suited to its existence."

This decision is directly opposite to the *dictum* in *Manning* v. *Mitcherson*, 69, Ga., 447, as follows:

"To say that if one has a canary bird, mocking bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street or to a neighboring house, that the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold that the traveling organist with his attendant monkey, if it should slip its collar, and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion."

The Albany Law Journal, commenting upon the New York decision, says:

"What appears to be the most serious feature of this decision is the court's declaration that an animal *ferae naturae* may be said to have gained its natural liberty when by its own volition it has escaped from all artificial restraints and is free to follow the bent of its natural incli-

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nations. As has been pointed out by the New York Law Journal, this rule would apply with harshness, if not with positive injustice, to the case of a wreck of a menagerie train and the escape of the wild animals constituting the menagerie. The modern development of the 'show' business, in which large amounts of capital are invested, would seem to require a more rigid application of the rule as to what constitutes a return to the normal state of nature of an animal *ferae naturae.*"

With the exception of the New York case above mentioned, there seems to be no other decision in the books, applicable to this peculiar phase of the law of wild animals.

It would seem that the more reasonable rule would be the one suggested by the plaintiff in the case, viz: that there is no return of such an animal to its natural liberty until it has reached its native place or where it is accustomed to live, and until such time the person retaking it acquires no property therein. F. A. H.

Recent Cases.

CONSTITUTIONAL LAW — STATE VS. JACKMAN — The Supreme Court of N. H. has recently decided a case which involves interesting questions of law. The decision declares unconstitutional an ordinance requiring the occupant or owner of a building to remove the snow from the sidewalk fronting the lot. Such statutes have come before other courts for construction. Among them are the cases of Goddard, Petitioner, 16 Pick. 504. Gridley v. Bloomington, 88 Ill. 544. Chicago v. O'Brien, 111, Ill. 352.

It is somewhat difficult to say that any of these cases, though opposite conclusions are reached, are wrongly decided; they are largely based upon the constitutional provisions of the respective states. Especially is this true of the present case, in which it would seem that the court has a somewhat exaggerated idea of the constitutional protection.

In the present case a statute had imposed the duty of caring for the streets upon the city, and while the ordinance declared invalid was expressly authorized by statute, and so, it would seem, of equal authority, the court holds that the duty still rests upon the city and cannot be imposed upon individuals—that it would be an unequal burden. This question is dealt with rather more summarily than one would wish.

The court holds that it is also not within the police power. The police power is hard to define, but it would seem that it might well be held that this requirement comes within that power. Another objection taken by the court is that the ordinance imposes an unequal burden; true the burden is not imposed upon every citizen, but is imposed upon every one coming within a certain class, and this it is submitted, is all that is necessary. Upon the whole, we think that the court has either reached a wrong conclusion or else has failed to give the right reasons for its decision.

CONSTITUTIONAL LAW — PLUMBERS' ACT — An act of the legislature provided an examination for license of plumbers and in case of a firm or corporation the examination or licensing of one member thereof shall satisfy the requirements of this act.

Held, unconstitutional, as denying to a plumber doing business alone the equal protection of the law.

State v. Benzenberg, 76 N. W. (Wis.) 345.

The court hold that the law is within the proper exercise of the police power, but unconstitutional on the same ground as the Ohio law. See W. R. L. J. October 1898.

CONSTITUTIONAL LAW — LIABILITY OF CITY — In the enforcement of a valid city ordinance, requiring citizens and residents to submit to vaccination,

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a "municipal corporation is exercising a governmental power delegated to it by the state and is therefore not liable to a citizen for damages arising from impure vaccine matter administered to him by an officer or agent of such corporation." Wyatt v. City of Rome 31 S. E. (Ga.), 188.

CRIMINAL LAW — CONFESSION— In connection with clear and positive proof of the corpus delicti, an extra-judicial confession is sufficient to warrant conviction.

Wimberly v. State, 31 S. E., (Ga.), 162.

The general rule in the U. S. is that to warrant conviction on extra-judicial confession, it must be corroborated by proof aliunde of the corpus delicti. Blackburn v. State, 23 O. S., 146.

It is probably not the rule in England. 3 Russ on Crimes 9 Ed. 366.

The cases do not generally, however, go to the extent of requiring "full clear and positive proof" of the corpus delicti, it is sufficient, if when taken in connection with the confession, it establishes the prisoner's guilt beyond a reasonable doubt.

CRIMINAL LAW — RAPE— Defendant, below 14, indicted and found guilty of attempt to commit rape. Contention that a boy below age of 14 is conclusively presumed incapable of committing rape. Held, although there is such a presumption, it is rebutted by proof that he was so capable.

Davidson v. Commonwealth, 47 S. W., (Ky.), 213.

The case, although opposed to many authorities, seems right on principle. Ohio seems to hold the same way. Williams v. State, 14 Ohio, 222.

IMPUTED NEGLIGENCE — In an action by a child of four years to recover damages for personal injuries, arising from the negligence of the motorman, the railway company can maintain neither the defense of contributory negligence, nor that the negligence of the parent is to be imputed to the child.

South Covington Ry. Co. v. Herrplotz, 47 S. W., (Ky.), 265.

The doctrine of Imputed Negligence in Hartfield v. Roper, (21 Wend., 615.) is repudiated as it has been generally throughout the United States.

INFANT'S TORT — PARENTS' LIABILITY— Defendant's son, aged 13, through his reckless discharge of a gun, frightened plaintiff's horse, so that she was thrown to the ground and injured. The evidence tended to show that the defendant furnished the gun to his son and permitted him to use it after he knew that his son handled it carelessly and recklessly. Held, defendant is liable.

Johnson v. Glidden, 76 N. W. (S. D.) 933.

The court recognizes the rule that a parent is not liable in damages for his child's tort. The case is, however, rightly held to come within one of the exceptions or modifications of the rule, that he is so liable when the act is done with his knowledge and assent. A similar case, Hagerty v. Powers, 66 Cal., is decided the same way. Shouler Dom. Rel. § 263.

INSURANCE — WAGERING CONTRACT — W. insured his life, and had the policy made payable to his executors, administrators or assigns; and, eight days after its issuance, he assigned it, in accordance with an agreement entered into before its issuance, to one who had no insurable interest in his life, upon consideration that the assignee pay the premiums thereon, as well as those upon another policy payable to W's wife, issued simultaneously, and also the payment of $25.00 to W., which assignment was recognized by the Company."

Clement v. Insurance Co., 46 S. W., (Tenn.), 561.

The case is interesting for two reasons; viz: it discusses the scope and effect of the non-contestable clause found so frequently in insurance policies of today; and it also reviews the much disputed question as to when and under what circumstances a person having no insurable interest in the life of another may get the benefit of insurance upon the latter's life.

The policy had in it an agreement making it non-contestable after it had been in force one year, if the premiums had been paid.

On the question of the scope and effect of the non-contestable clause the court say, at page 563:

"It is virtually saying to the insured that 'I will take one year in which to ascertain whether your representations are false or not, and whether you

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have been guilty of any fraud in obtaining the contract; and if, within that period, I do not and cannot detect such falsity and fraud, I will obligate myself to make no further inquiries in the matters, and to make no defense on account of them.' "

The facts in the case show that the parties to whom the assignment of interest in the policy was made took it in accordance with an agreement made before the issuance of the policy, and the Court find that the evidence shows a fradulent contrivance and purpose in this matter, and that such contract was in the nature of a wagering contract and void as against public policy, and say:

"While the court is disposed to give to the assured and parties taking under him in good faith the full benefit and advantage of the non-contestable clause, by shutting off inquiries into the truth or falsity of the statements made in the application, and this because of the contract between the parties, it can see no reason why the like advantage and benefit should be extended to one who has no insurable interest in the assured, who does not take or claim in good faith, and whose entire connection with the matter is shown to have been for a speculative and fraudulent purpose; and no sound public policy can be subserved by so holding, but. on the contrary, such holding would sanction wagering insurance contracts to the great detriment of the public morals and public good."

The writer is not at all sure but that the Supreme Court of this State would in all probability, upon the same state of facts, make the same finding. The law on the subject, however, as applicable in Ohio, is stated in 41 O. S. 232, where they hold that one who has obtained a valid insurance upon his own life, may dispose of it as he sees fit in the absence of prohibitory legislation or contract stipulation; and it is immaterial in such case that the assignee has any insurable interest in the life; but the case, however, in which this principle was commenced was not tainted with a suspicion of a fraudulent wager.

As illustrating the conflict upon this general subject, refer to 85 N. Y. 593 at 598 and 600; and 100 U. S. 775, where a contrary doctrine is laid down, to that of the New York case.

It would be interesting to know what, if any, consideration the court, in the case reviewed here, gave to the right of the assignees of the policy to recover the premiums paid by them, together with the sum of $25.00 consideration for the transfer. It does not appear that they discuss the question. F. S. M.

STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR— Plaintiff delivered horse to defendant May 28 under an oral agreement, made before May 1, by which defendant was to keep the horse a year for the use of it.

Held, not within the Statute of Frauds.

Martin v. Batchelder, 41 Atl., (N. H.), 83.

The New Hampshire court adopts the now general rule in the interpretation of the Statute of Frauds, that if the contract *may* be performed within a year, although the parties did not intend it to be, it need not be in writing. Blakeney v. Goode, 30 O. S., 350.

In the principal case the court say if the horse had died within the year, the agreement would have been fully performed. This construction results in narrowing the operation of this clause of the statute to very few cases.

ORIGINAL UNDERTAKING— A building contractor employed another to do plastering. The plasterer told owner he would do the work only if he, the owner, would pay him, to which the owner agreed.

Held, unless the plasterer's agreement with the contractor was abandoned, the owner's promise was collateral and void under the statute.

Wilhelm v. Voss, 76 N. W. (Mich.), 309.

The test of a novation is one of consideration or benefit to the party promising and not that the original undertaking must be abandoned. The Ohio court would have decided the case according to this rule, and rightly. See Eastbrook v. Gebhart, 32 O. S., 415.

SUBSCRIBING WITNESS— EXECUTION OF NOTE— A promisory note was attested by B. as a witness. When called upon he denied that he ever saw the note or signed it.

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Held, in such case other witnesses may be called to prove the execution. Buchanon v. Simpson Grocery Co., 31 S. E., (Ga.), 105.

It would seem that in cases like the above where attestation is not required, the subscribing witness need not be called, but execution proved by any competent evidence. Shaw, C. J., in Amherst Bank v. Root, 2 Metc. 522. But see Gaines v. Scott, 30 B. 242. In the principal case, however, the plaintiff had produced the subscribing witnesses and the only question was whether he, denying the execution and his signature to it, its execution could be proved by other witnesses. The general rule seems to be that such testimony is admissible. A more difficult question arises where the witness admits his signature but denies that he saw the execution. Even in such cases it seems secondary evidence will be admitted. Reinhart v. Miller, 22 Ga., 402.

TELEGRAPH—MENTAL ANGUISH — The negligence of Telegraph Co. in delivering a message made it impossible for the plaintiff to attend the funeral of his mother, thereby causing him great mental anguish. Held, that this is an element of damages, for which there can be a recovery, whether accompanied by injury to person or not.

Western Union Telegraph Company v. Sweetman. 47 S. W. Rep., (Texas), 676.

The court of Texas affirms its former decisions holding that mental anguish is an element of damage for which there can be recovery, whether accompanied by physical injury or not. The general rule is probably contra. 23 O. S. 10.

The court, also quoting from the decision of Telegraph Co. v. Coffin, 88 Tex., 94, says that the plaintiff for whose benefit it is sent, and who is named in the message, may sue, though he is not a party to the contract. See also Western Reserve Law Journal, Vol. IV., No. 5, page 112.

Ohio Digest.

Administrator. Where common pleas has declared a conveyance made by intestate fraudulent and void at suit of administrator, application may then be made to probate court to decree sale of lands to pay debts of estate. 16 C. C. 466.

It is not the duty of an administrator or executor, acting for creditors, to account to court for trust funds which belong to heirs and are not assets to be paid creditors.

Advancement. In petition for partition alleging advancements, it is not sufficient to charge heir-at-law to allege an advance to her husband without showing that she knew of advance and the intention and acquiesced therein. 7 O. D. 525.

Adopted Child. May inherit from its adopter, but not through him from his ancestors. § 3120 R. S. 40 Bull. 293.

Agency. To show authority of an alleged agent, evidence that principal had guaranteed to others payment of price for goods similarly purchased by agent on his own account, is not competent. 40 Bull. 291.

Appropriation. Owner of land which has been appropriated by R. R., has election between action for compensation and action to recover possession. 16 C. C. 639.

Assignment. Conveyance by insolvent debtor to one of his creditors in satisfaction of latter's debt and in consideration of his promise to assume payment of two other creditors, does not constitute such creditor a trustee for general creditors. 40 Bull.481.

But a conveyance by an insolvent to a creditor for payment of his own debt and for payment of another creditor, constitutes the grantee a trustee for all the creditors. 40 Bull. 483.

When land offered for sale by an assignee is bid in by mortgagee at a price less than the mortgage debt, mortgagee is not required to pay over the money and assignee gets no percentage as out of "proceeds of real estate sold" under § 6357 R. S. 40 Bull. 332.

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Arrest. Arrest without warrant not on view can only be made by officer or private citizen when felony has actually been committed and on reasonable suspicion that party arrested is guilty. 7 O. D. 519.

Banks. Banking corporation on sale of bonds not their own property, though having no authority to guarantee payment thereof, may contract to repurchase them at same price on demand. 16 C. C. 457.

Bill of Exceptions. May be taken to a ruling on a motion made during trial, without necessity of a motion for new trial, but when so taken, it must show all the evidence on which the trial court acted. 16 C. C. 662.

Contracts. Agreement to pay any future judgment in consideration that court grant a motion for new trial, is void as against public policy. 7 O. D. 557.

Constitutional Law. § 2575.— 79 R. S. Authorizing mayor of every city of first grade of first class to appoint a building inspector, is unconstitutional. 16 C. C. 647.

Criminal Law. Charge in murder case: "Deliberation and premeditation for a moment, as well as for a week, will render an intentional killing murder in the first degree." Sustained. 16 C. C. 646.

Covenant. Covenant in a deed against incumbrances runs with the land. 16 C. C. 461.

Deed. Appurtenances passed by a deed of conveyance, as effectually without as with mention. 7 O. D. 516.

Evidence. In personal injury case brought by administrator, admissions of decedent as to manner in which accident occurred, are admissible. 16 C. C. 470.

Where defense in action for injury caused by defective sidewalk has shown that sidewalk was in good condition subsequent to accident, evidence of subsequent repairs is admissible. 16 C. C. 470.

Entries made in pass book, containing an account for rent, by lessor, when book is kept in possession of lessee, will be conclusive against lessee as to terms of the contract and amount of payments. 7 O. D. 497.

Guaranty. Written guaranty of performance of a contract in enforcible, though contract itself is voidable as ultra vires. 7 O. D. 465.

Insurance. § 3625 R. S., regarding defense of false answers in application is a valid constitutional enactment; it must be shown that answers were wilfully false and fraudulently made, that they were material, that they induced company to issue policy, that but for them policy would not have been issued and that neither company nor agents had knowledge of falsity or fraud previous to issuance of policy. 40 Bull. 309.

Agreement in policy for a paid up policy demandable from company on surrender of receipted policy, is not an independent contract, but a part of conditions of policy. Held that fact that beneficiary was unknown at the time of the surrender of the policy, did not excuse failure to receipt policy on surrender. 16 C. C. 536.

Judgment. Where summons in action before a J. P. is served less than three days before time of appearance, judgment is absolutely void. 16 C. C. 637.

Jurisdiction. State courts have jurisdiction in actions against receivers who have been appointed by Federal courts. 7 O. D. 522.

Where matters of legal defense are determined by a court of equity, such determination, while ground for a reversal of judgment, does not render judgment void for want of jurisdiction so as to be subject to collateral attack. 16 C. C. 551.

Justice of Peace. Authority of justice to grant new trial limited by § 6560 R. S. and an order made by him more than five days after verdict and judgment is void.

Lease. Lease of building for five years, providing for a lien in favor of lessor on property in or subsequently placed in house, which is not witnessed and acknowledged, is void as a lease and creates no lien; entry does not make such a lease valid as to all its terms for one year. 7 O. D. 503.

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Liens. Where levy made by judgment creditor on debtor's property prior to his assignment and by subsequent agreement with creditor, such property is sold by assignee, the creditor's lien on proceeds of sale is prior to lien of operatives employed by assignor. 16 C. C. 647.

Mandamus. Action in mandamus in circuit court to control action of sheriff under writ issued by C. P. will not be entertained. 16 C. C. 680.

Proceedings in mandamus, effect of which will be that of an injunction, are within original jurisdiction of circuit court. 16 C. C. 680.

Mistake. Money paid by executor under mistake as to his rights and duties as executor, there being no mistake of facts, cannot be recovered back. 40 Bull. 293.

Mortgage. Suit for reformation of defective mortgage will be sustained as against general creditors of insolvent estate. 16 C. C. 634.

New mortgages given by heirs of an estate in substitution for old mortgages made by deceased, to continue and secure debts incurred by deceased, will be subrogated to rights of old mortgages. 7 O. D. 486.

One holding an unrecorded mortgage will be postponed to rights of third parties having liens on property by attachment or assignment, though latter are subsequent in time. 40 Bull. 328.

Where a foreclosure suit is brought and thereupon the mortgagor files a petition in voluntary bankruptcy, the trustee in bankruptcy is entitled to the property. 16 C. C. 526.

Municipality. Where city enters into a contract whereby it acquires property, it is liable thereon, though not legally authorized to enter into the contract. 16 C. C. 541.

Statutory provisions regarding grading of cities in Ohio and manner in which grade of a city is changed fully considered. 16 C. C. 509.

A village is without power to enter into a contract under the provisions of a new ordinance until ten days after final publication of the ordinance. 16 C. C. 506.

A village can only enter into a contract for electric lighting for a term of ten years. 16 C. C. 507.

Mutual Benefit Society. Regulation precluding members from going into courts to assert a right, compelling submission to tribunal provided for by order, is void. 16 C. C. 546.

Where plaintiff claims sick benefit from lodge, to which he would be entitled in case of sickness disabling him from work, his own testimony as well as that of other witnesses, not experts, as to his condition, is admissible. 15 C. C. 546.

Negligence. One going upon sidewalk known to be defective, is guilty of contributory negligence. 16 C. C. 470.

Care required of minor is that degree of care which children of same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances. If such care is not exercised, minor will be guilty of contributory negligence. 16 C. C. 487.

Parties. Where several joint and several obligors are named as defendants in action, but summons is not issued against one of them, such a one is a mere nominal party and has no standing in court. 7 O. D. 542.

Partnership. Release of one partner by compromise does not under statutes operate as a release of all. 7 O. D. 521.

In suit of one partner against the other for an account, no judgment can be rendered until account has been stated, and balance due ascertained; burden is on plaintiff to furnish sufficient evidence to enable court to state the account. 59 O. S. Adv. 60.

Sales. Conditional sales of chattel property to be paid for in installments are governed by § 7913, 73 R. S., unaffected by execution of mortgage on the property to secure payment of the installments. In action of replevin by vendor, vendee should have amount to which by such statute he is entitled, awarded him as damages. 40 Bull. 296.

Stockholders' Liability. Suit against stockholders of an insolvent corporation may be maintained in any county where any stockholder can be served, without regard to where place of business of corporation was; not

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necessary to enforce stockholders' liability against an estate to present claim to executor. 7 O. D. 527.

Where statutory liability, if paid in full, was not sufficient to satisfy claims of creditors, a settlement was made whereby creditors accepted a percentage, a creditor who did not join in settlement, can, in a subsequent suit, only recover what his pro rata share would have been, if statutory liability had been paid in full, although balance of statutory liability, after payment of percentage in settlement, was sufficient to pay his claims in full. 16 C. C. 530.

Stockholder is chargeable with knowledge of laws under which corporation was created and, impliedly, contracts with all becoming creditors, that he will assume the liability imposed by such laws. 7 O. D. 532.

Stoppage in Transitu. Right to, may be terminated by transfer of bill of lading to bona fide purchaser by vendee; but sale by vendee to carrier in consideration of pre-existing debt, is not a bona fide transfer such as bars right. 7 O. D. 478.

Taxes. Where by mistake valuation of property is fixed at a sum greater than that intended, it is duty of the auditor to correct such mistake and report the matter to the commissioners, though mistake does not appear by record, but is shown by parol only. 40 Bull. 289.

Trust. To establish a resulting trust in favor of one paying purchase money for land, it is necessary that money be furnished contemporaneously with purchase. 16 C. C. 461.

Lands held in trust not liable for debts of trustee. 40 Bull. 328.

Warranty Deed. In action to recover for a breach of warranty in a deed, which was executed by one not in possession or seized, in fact, at the time, it is not necessary to allege an eviction; nor need special damages be alleged. 7 O. D. 501.

A tortious adverse possession of land does not constitute a breach of warranty in a deed executed by one having perfect title, though out of possession. 7 O. D. 537.

Venue. Application for change of, under § 5033 R. S. being refused, error, to be allowed, must be prosecuted within six months. 16 C. C. 633.

Book Reviews.

A HANDBOOK FOR TRUSTEES—By Augustus Peabody Loring, A. B., LL. B., Harvard, of the Boston Bar. Little Brown & Co., Boston.

This is a concise little volume of about 200 pages, dealing with the rights, liabilities and duties of trustees and beneficiaries. It is always a hard matter to speak accurately of the value of a treatise from a mere examination of the contents; to determine its value it must be used. From such examination as the writer has been able to give the book, it seems to be of great value. The rules of law in this difficult branch are stated simply and plainly, and seem to be accurate. The citations which are quite numerous have not been verified by the writer, so that he cannot speak as to their accuracy.

The style of the book is to be commended. The law has grown to such proportions that it is at least undesirable, if not impossible, to treat satisfactorily in one treatise, the problems involved in what is supposed to come under one branch of the law. One great merit, which if often wanting, of a book is accessibility to the questions dealt with. This is better obtained in a small handbook on a particular topic, than in a ponderous tome on an entire subject. The book in hand seems to meet these requirements satisfactorily. It cannot but be of much to the student who attempts to master this difficult subject.

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THE WAR REVENUE LAW OF 1898—Little, Brown & Co., Boston, Mass.

This little volume will be found very convenient both by the members of the legal profession and by business men generally. It is an explanation of the recent war revenue law. The method adopted is to give the provisions of the law, and throw light on them by means of extracts from the former measure, and by a citation and discussion of authorities dealing with the problems arising under it, and likely to arise under the present law. Circulars from the Internal Revenue office are also included. A copious index of the contents is given. It is probably the most complete and satisfactory of the books on this subject published recently. F. G.

Supreme Court Bar Examinations.

EVIDENCE.

32. By what process is the attendance of a witness at a trial secured? How is he made to bring a paper in his possession?

33. Distinguish between a deposition and an affidavit.

34. Proof is required of a written instrument; what would constitute primary evidence of its contents, and what secondary?

Mention at least three circumstances under which secondary evidence of its contents would be admissable.

35. What is a leading question? When may leading questions be put to a witness on examination in chief?

May a witness be required to answer a question if by so doing he will subject himself to a civil action?

36. In a civil action for damages for assault and battery, the plaintiff offers the record of a conviction of the defendant in the Police Court for the same assault; is it competent? Why?

37. State the rule in reference to varying a written contract by oral evidence.

38. Can the fact of the existence of an agency be proved by the admission of the agent? Why?

39. What is meant by burden of proof? A sues B on a note; B admits its execution, but sets up in defense that the note has been paid; on whom is the burden of proof? Why?

CORPORATIONS.

40. What is a stockholder's remedy against a corporation for refusing to transfer his stock to another person upon its books?

41. What is necessary before an action to enforce stockholder's liability will lie?

42. Is an individual stockholder liable over and above the stock by him owned in a sum equal to the amount unpaid and the farther sum equal to the amount of his stock upon a claim arising from a tort?

43. How does the Constitution of Ohio restrict the General Assembly in conferring corporate powers?

44. What power has the Legislature over charters or franchises previously granted?

45. What is meant by ordinary care?

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THE

Western Reserve Law Journal

Vol. IV JANUARY, 1899 No. 8

Education in the Art of Practicing Law.

The value of tactical skill, in schemes of professional education, is apt to be underrated. There are several adequate reasons for this want of interest. Theoretical science naturally first claims the attention of the student. It is not always easy for the student to lay just emphasis upon the truth that law, as an object of study, is an applied science. That the study of jurisprudence, as an abstract pursuit, is being incorporated into the University curriculum, is an encouraging sign of the growing breadth of academic education. Higher education treats a certain knowledge of jurisprudence as essentially an end and not a means. The American Law School as a department of a University System has had much to do in giving prominence to jurisprudence as a branch of history; the marvelous development of sociological and economic studies, has done more.

This expansion of the field of Academic Education is not to be viewed with alarm. The demand for electives, and the breaking away from the old "humanities" in college courses of instruction, is a sign of advancement and hope. It would be interesting to know how many in our colleges are studying law, without any definite purpose of ever making the knowledge of it, a practical outfit or equipment for special service. Doubtless the numbers are growing. The more the better. No intelligent person should deplore the fact. The suggestion is made simply and solely to call attention to the evidence that the scientific, and not the practical, side of jurisprudence is becoming dominant in methods of education.

The highest usefulness of the American Law School can be sesured only by recognizing the truth that its real mission is the training of students for the practical work of the Bench and Bar. Apart from this practical aim, these institutions become merely auxiliaries to general University instruction. It is impossible to mistake the astounding

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growth of clinical methods of teaching in the medical schools. The medical college of today, without the privileges of one or more hospitals, would be an anomoly. It is not too much to say that a major part of medical education is bed-side instruction; in some branches, except a slight frame-work of theoretical teaching, the whole course is clinical work.

How can training in the art of practice be best attained in the law school? A brief cursory consideration of this proposition is the purpose of this paper.

There are at least three general methods involving more or less opportunity for knowledge of the rules of legal practice.

First: The study of the history of actual causes in all the details of procedure involved in a judicious use of the Case Method of teaching.

Second: The elaboration of fictitious causes, and construction of the machinery of trials, in improved Moot Court work and methods.

Third: The securing of actual experience to the novitiate, by obtaining, through legal regulations, the right and privilege to practice in courts of justices of the peace and other inferior courts.

The excellence of instruction in the law school of the Western Reserve University lies, in no slight degree, in the prominence and importance given to the first two of these methods. The case system of teaching is abundantly and successfully applied; and the plans adopted for Moot Court work are such as to subordinate the development of rules and principles, to the study and practice in procedure.

The third method of opening ways and means toward empirical knowledge for law students, may at first seem preposterous and utopian. Legislation itself has done almost nothing in this country for the cause of legal education. The medical profession, on the other hand, has been wonderfully safe-guarded and conserved by law. Legislatures and courts have spared no labor to secure the integrity, and advance the interests of this great profession. All charitable institutions, such as public hospitals, infirmaries, etc., are, under law, required to yield up material for anatomical and medical study. The severest penalties are denounced to prevent the intrusion of unworthy and unqualified practitioners. The doors of the profession are guarded by the strongest sanctions of law. On the other hand, the profession of law is invaded from all sides by poachers and illegitimate practitioners of all sorts. One of the most lucrative branches of legal practice, forty years ago,—and one of the most legitimate, was the business of collecting debts and enforcing ordinary commercial obligations. Now, all that pertains to such employment, is confided to collection bureaus, agencies, notaries public, and not to lawyers at all. Whoever thought of a law to secure this business exclusively to the bar; and yet it would

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be quite in keeping with that wise and salutary policy which seeks to uproot quackery in the medical profession.

The policy of legislation which promotes the interests of medical education, and puts up barriers against ignorance and empiricism, is based upon the theory that the State has an interest in the qualifications of those who seek to cure diseases and deal with the health of people. This is a sound policy. The sure, wise, and certain administration of public and private justice, certainly affords equal grounds for the application of this same public policy. The State certainly has an abiding interest in that profession, which a great French jurist once said was "as ancient as the magistracy, as noble as virtue, and as necessary as justice."

The State very wisely and justly regulates the qualifications, and prescribes the period of study, of applicants for the bar. What impropriety or inconsistency would there be in so ordering the procedure in the inferior courts as to promote opportunities for professional education? Freedom to select his advocate, will, of course, ever have to be accorded to the suitor; but the law could require magistrates to give preference to law students in all judicial appointments and assignments to professional or quasi-professional functions and duties, such as trusteeships, masters in chancery, receiverships, and the like. Of course this could only be done where the question of personal fitness had ceased to be a factor. There are many ways in which the work of the courts could properly be made to promote a sound legal education.

No lawyer of any considerable experience at the bar but fails to observe, with some degree of apprehension, the parceling out of his legitimate field of labor to non-professional agencies, and the changes resulting to professional functions and duties. It is neither rash nor unwise to predict that the time will come when the proper standards of professional qualification, and the just rewards of professional work, will call for the enactment of laws to conserve and preserve the profession of the law.

The manifold advantages of a well conducted law school as a place for acquiring an accurate, broad, and sound professional education, are manifest to all. The general public is deeply interested in these institutions. So far as consistent with the great business of administering justice, the courts should be made more and more the nurseries and training schools for the legal novitiate. The public value of the jury tribunal as an institution is due in no small degree to the fact that it affords admirable educational opportunities to the common citizen, in the higher functions of citizenship. Surely the courts may properly become places of training for the development of that practical tact, skill, and adaptiveness, so essential to those who seek to fit themselves to become ministers in the temple of justice.

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Technical skill, facility in adapting himself to his environment in court, readiness in manipulating practical expedients, and the various legitimate arts requiring tactful skill in a lawyer to successfully manage litigation, are important factors in a professional career. Much of this art of practice is expected to be deferred until the attorney enters practical life. In this age of activity and prompt returns to professional endeavor, the lawyer will find himself confused, embarrassed and handicapped at the outset, if he is wholly lacking in the skill to immediately apply his knowledge to practical affairs. The most important problem connected with law-school education, is the arrangement of adequate facilities to secure knowledge of practice. A novitiate term in a law office ought not to be required as supplemental to graduation in these schools.

The law itself should be so adjusted as to cooperate with institutions of legal learning in securing this needed branch of education to students, through the actual operation of the courts of justice.

HENRY C. WHITE.

Alteration of Negotiable Instruments.

Alteration, as known in the law, arises more frequently in cases relating to negotiable instruments than in any other. The doctrine of alteration had its origin in the so-called Pigot's case (11 Coke 27) and has been extended to every situation where instruments are presented or sought to be used as evidence for the enforcement of an unexecuted obligation or contract. Its applicability to Promissory notes and Bills of Exchange was first considered in the case of Master vs. Miller, (4 T. R. 320). This was an action by an indorsee against the acceptor of a Bill of Exchange which had been materially altered while in the hands of the payees, and before the indorsement. The main question was whether the rule that an alteration in a material part of a deed avoids it, applied to instruments not under seal, and the court held, in able opinions by all the judges, that it did, and this too, whether the alteration was made by a party in interest or by a stranger. And further that by reason of the alteration, however made, the right of action, whether upon the instrument or original cause of action, was forever gone. The doctrine of the American cases has materially modified the holding of the English courts as laid down in the case of Master vs. Miller, supra, and treats the alteration made by a stranger, as a mere spoilation, without affecting the right to recover upon the instrument as it was (Thompson vs. Mussil, 41 O. S. 319), and that a note given for a pre-existing debt, which was subsequently altered without any fraudulent purpose and under an honest mistake of right,

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does not preclude a recovery upon the original cause of action, the precedent indebtedness.

Merrick vs. Boury, (4 O. S. 60).

Two kinds of classes of alterations are spoken of in all the text books, denominated as: First, material alterations; second, immaterial alterations.

The material alteration as defined by Daniel is any change in the terms of a written contract which varies its original effect and operation, whether in respect to the obligation it imports or to its force as a matter of evidence, when made by any party to the contract, unless all the other parties to the contract gave their express or implied consent to such change. The effect of such alteration is to nullify and destroy the altered instrument as a legal obligation.

An immaterial alteration is so varying the terms of an instrument as neither effects the rights nor interests, duties, nor obligations of any of the parties bound. The immaterial alteration does not avoid the instrument nor render it unenforcible.

Our design in this short article is to refer to some of the leading principles or doctrines relating to material alterations, and to note in as brief a manner as possible, how the Ohio Supreme Court has adopted or modified them in applying the same to the different cases adjudicated by it. An alteration may be effected by adding to the instrument some new provision or by substituting one provision for another or by obliterating or subtracting from it the special provision incorporated in it. It may consist in changing: its date; or the time; or place of payment; or the amount of principal; or interest to be paid; or the medium or currency in which payment is to be made; or the number or the relation of the parties; or in the character and effect of an instrument as a matter of obligation or evidence; and it will not avail as an answer to a plea of alteration that it will be a benefit to the party obligated.

In their effect material alterations may be: First, those fraudulently made; second, those innocently made. The effect of a fraudulent alteration not only destroys the instrument by thus destroying its legal identity, but also extinguishes the debt for which it was given. It cannot afterwards be made the basis of, or evidence for a recovery in any form of action whatever. As a reason for this rule, we quote the words of Justice Swain, in the case of Wood vs. Steele (6th Wall., 80). "The agreement is no longer the one into which the defendant entered. Its identity is changed. Another is substituted for it without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds; to prevent and punish such tampering, the law does not permit the plaintiff to fall

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back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the parties sought to be wronged."

Second: As to material alterations innocently made, while the courts hold universally such instruments to be ipso facto avoided, yet an action upon the original consideration for which the instrument was given, may be maintained. Such at least is the holding of our own Supreme Court in the case of Merrick vs Boury, (4th O. S. 60).

Where Thurman, Judge, said, " When the alteration is in fact fraudulent, there ought to be no recovery, but when made without any fraudulent purpose, there may be a recovery upon the original cause of action," "And it is difficult to perceive," he says, "how the destruction without fraud, of a mere security given by the debtor himself, and the destruction of which can in no event prejudice him, can operate to discharge the precedent debt. Inasmuch, then, as we are well satisfied that the alteration in question was made under an honest mistake of right, we are of the opinion that the plaintiffs below were entitled to recover upon the original cause of action, the amount admitted to be due, and for which the note was given."

As to the time when a material alteration becomes effective, our own Supreme Court has differed somewhat in its holdings. Judge Ranney, in one of the earliest cases involving the alteration of negotiable instruments reported by the Supreme Court of Ohio, enunciated the doctrine that "the alteration must have been made after the delivery of the instrument, and after it has taken effect, and by or with the privity of one claiming a benefit under it." Fullerton vs Sturges, (4th O. S. 536).

This doctrine was modified afterwards by our Supreme Court in the case of Jones vs Bangs, (40 O. S. 139), holding as follows: "Where a complete note payable at a future day, and containing any stipulation as to interest, is altered by the principal maker without the knowledge of his surety before its delivery by the addition of the words 'ten per cent interest from date,' such alteration is material, and makes the note void against the surety; although the same is made without the knowledge of the payee."

Judge Martin, in commenting on the opinion rendered by Ranney, Judge, in the case of Fullerton vs Sturges, supra, "As we understand that case, the alteration consisted in affixing a seal to the name of the surety before delivery, and was wholly immaterial. Therefore, all that was said by the eminent Judge who delivered the opinion on the law relating to a material alteration, is obiter."

The effect of a material alteration upon a bona fide holder, is the same as with any other holder, and the instrument is vitiated in such person's hands. There is, however, an exception to this rule; as where

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by the careless execution of the instrumnt, the obligor left room for any alteration to be made, either by insertion or erasure, without defacing it or exciting the suspicions of a careful man, he will be liable upon it to any bona fide holder, without notice, when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. Young vs Grote (4th Bingham 253).

Adding the name of another drawer or maker to a note is a material alteration, such as will discharge the original parties not consenting thereto. (2nd Parsons on Notes and Bills, 537) (Mersman vs Werges, 112, U. S. 139) (Wallace & Park vs Jewel, 21 O. S. 163). In the last case cited the name of Rany Bros. had been added to a promissory not given by Aimon Rany to Amos Jewel, and indorsed before delivery by two accommodation endorsers. The addition of the name Rany Bros. as new makers was held to be a material alteration and operated to release the accommodation indorsers. In this case the court treated the original maker, Almon Rany and the two accommodation indorsers as holding the relation of original makers, with Rany as principal, and the others as sureties according to the case of Seymour vs Mickey, 15th O. S. 515. All the cases unite in the application of this rule when there are several makers or co-sureties. The authorities, however, are divided in cases where there is only one maker and another or others have been added without the consent of the original maker.

Mr. Daniel, after reviewing the cases upon this subject, con cludes by saying "On the whole, we think it may be regarded as an immaterial alteration." (2nd Daniel Negotiable Instruments, Section 1389.) Mr. Parsons says "We think the wiser rule is that which looks first to the integrity of the instrument and secures that, though there be no actual injury nor purpose of fraud." (Parsons on N. and B. Page). We are unable to find any case in Ohio deciding this point, but the addition of the name of one as surety to a promissory note without the consent of the maker does not discharge him, and the same rule applies when an additional name has been added as a guarantor, though the authorities differ somewhat in regard to the addition of the name of one signing as surety, they generally agree that where one does sign as a guarantor, it is an immaterial alteration. The rule in Ohio will be taken from the language of White, Judge, in the case of Wallace & Park vs Jewel, 21st O. S. 172, as follows: "If the object had been to guarantee payment or to furnish additional security otherwise than by becoming or assuming to become a joint maker there could be no objection to the accomplishment of such object. The new agreement in such case would be a collateral one and it would leave the integrity of the original note not affected."

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For a still more obvious reason, if the name of one or two makers, drawers or payees who have indorsed the paper, be erased, this is such a material alteration as to release all the other parties obligated. But the erasure of the name of a surety, guarantor or indorser is not such an alteration as will invalidate the note as against the principal obligors. The greater number of Ohio cases have arisen where the rights of sureties have been involved. It is almost needless to state that a material alteration in a negotiable instrument is an available defense for the surety. The cases on this subject in this state begin with that of Sturges & Hale vs Williams, (9 O. S. 444). The alteration was here made by the defendant by interlining in the body of the note the words "Payable at the office of Sturges & Hale" without the knowledge or consent of Williams, the accommodation indorser. Scott, Judge, says in his opinion, "The right to make such alteration in, or addition to the terms of a note after indorsement, if conceded to the maker, might certainly be so exercised as greatly to prejudice the indorser, if made payable at a distant point without his knowledge, he might find himself made liable by notice of dishonor received days or weeks after he had every reason to suppose the risk terminated. He might be willing to become surety for the prompt payment of a note made by the maker, provided his attention would be called to the subject by a personal demand at maturity, but be unwilling to risk this dishonor without such demand; at all events he had a right to make his own contract and insist on its terms. It was not competent for other interested parties by a subsequent alteration of this written evidence to vary his obligation without his consent, although it may not appear that the change in fact was prejudicial to him." Of the same import are the following cases: In Bolt vs Brown, 13th O. S. 364, the principal maker at the request of the payee added the words "Interest to be paid annually" without the consent of Brown, who was surety upon the note, and in the case of Patterson vs McNeely, Exr., 16th O. S. 348, the alteration consisted in interlining the word "paid" before the word "annually" in the clause "the above to be paid at ten per cent interest annually" without the consent of the surety who was held by reason thereof to be discharged. Likewise in the case of Harsh vs Klepper, 28th O. S. 200, where the rate of interest was changed from six to seven by the principal at the request of the payee, without the consent of the surety, and the case of Thompson vs Massie, 41st O. S. 307, is of similar character.

As to the burden of proof in cases of alteration the authorities are also in conflict. The text books, especially Parsons, Daniels and Norton, lay down the rule that the onus of explanation rests with the party producing the instrument or seeking to recover upon it. Mr. Parsons

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cites numerous authorities in support of his position, and states his reasons as follows: "On general grounds it would seem reasonable to say that the holder of a note is he on whom, prima-facie, at least, the right, the duty, and the responsibility of possession all rest. The instrument is in his hands; if it has been tampered with, this has been done either by him or by his connivance or by his negligence. This may fairly be presumed; and unless he can rebut this presumption by adequate explanation and proof, he must take the consequences."

Judge Bartley in Huntington & McIntyre vs Finch, 3rd O. S. 449, followed the same rule, his language being, "The rule, however, established by the greater weight of authority, both in England and in this country, appears to be that where the alteration is suspicious and beneficial to the holder of the paper, the party seeking to enforce it is required to explain it before he can recover." He was severely criticised in this statement in the case of Franklin vs Baker, 48th O. S. 296, by Judge Minshall when referring to this case, who said there, "The only question was as to the materiality of the change that had been made in the note, the erasure of the name of the surety."

The observations of the court may, conformable to the view taken by many of the courts at that day, indicate an opinion that the burden of explaining what are termed alterations of a suspicious character, is on the plaintiff. But no such question was before the court and its remarks should be confined to the case it had under consideration.

The decision in this case of Franklin vs Baker has settled the rule of law in Ohio in reference to the onus probandi, and we here quote the language of Minshall, Judge, in order to give fully his reason for so holding. Especially inasmuch as it is in conflict with the rule laid down in the text books. "There is no sounder principle applied by the law to the affairs of men than that which assumes what appears to have been done, or done with a proper motive, and conformable to its requirements, until the contrary appears, and the reason is that the assumed fact is generally found to conform to the truth. It is true that we are without any definite statistics, but the low estimate of our race entertained by the pessimist aside, we may safely trust our own observation and experience for the assertion that ninety and nine alterations, to be found on the face of written instruments, were lawfully and properly made, for every one that had its origin in a fraudulent purpose. The law in its wisdom trusts much to the general honesty of men. Indeed, if human depravity were such that it could not, if honest men were the exception and rogues the rule, civil government would be impossible. Therefore the question as to when an alteration was made in a written instrument is one of fact to be determined from a consideration of all the circumstances, and where it is claimed to have

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been made for a fraudulent purpose, the burden of establishing the fact must, according to the reason and analogies of the law, be upon the party who asserts it." The foregoing case is cited with approval in Newman vs King, 54th O. S. 282. One further question has come before our Supreme Court worthy of notice, which arose in the case last mentioned, viz., whether a note could be altered by the payee to conform to the mutual intention of the parties without subjecting it to the defense of being materially altered. The promissory note in question bore the date, June 22, 1890, and was altered by the payee without the consent of the maker to June 23, 1890, in order to make the note bear its true date as intended by the parties to the note. The court held such change to be a material alteration, mainly on the ground that an adequate remedy has been provided, according to the principles of equity jurisprudence, by courts having jurisdiction to correct such mistakes, and where rules of evidence appropriate to establish the fact of mistakes are prescribed and enforced; and inasmuch as this remedy is afforded to parties to correct these mistakes, it would destroy the security otherwise given these instruments in the law merchant; therefore such alteration not only renders the instrument void as to the payee, but even in the hands of an innocent indorsee for value.

To summarize: First: A material alteration destroys the integrity of the instrument, makes a new contract for the parties, without mutual consent, and releases all parties obligated who have not consented thereto.

Second: This will be the effect whether the change is prejudicial or beneficial.

Third: The alteration must be made by some one other than a mere stranger.

Fourth: A fraudulent alteration avoids all recovery upon the instrument itself, as well as upon the original obligation.

Fifth: That an alteration innocently made does not preclude a recovery upon the original cause of action.

Sixth: The addition of an additional maker, drawer, or acceptor to a bill or note will discharge the original obligors not consenting.

Seventh: That the addition of one as surety or guarantor will not be a material alteration of the instrument.

Eighth: The erasure of one of the parties originally obligated, without the consent of the others, operates as a discharge to them.

Ninth: Any material alteration will discharge one who sustains the relationship of surety without his consent.

Tenth: Where a defendant pleads that the instrument has been altered since delivery, the burden is upon him to establish this fact; and this is so whether the alteration is apparent upon the face of the instrument or not.

Eleventh: That a party cannot change an instrument so as to conform to the real intentions of the parties. He must first seek the aid of a court of equitable jurisdiction for reformation of the instrument.

A. G. CARPENTER.

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Western Reserve Law Journal

Published Monthly by Members of the Franklin T. Backus Law School of the Western Reserve University.

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Editorial

In the death of Hon. Richard C. Parsons the city of Cleveland loses one of its most distinguished citizens, and our University one of its staunchest supporters.

Mr. Parsons has been identified with the growth and development of Cleveland for fifty years. He came upon the stage of life at a time when the country needed men of power. At twenty-three he began the study of law, and two years later, in 1851, was admitted to the Bar.

His keen nature carried him easily into political life. From the council he went by natural and easy stages through the legislature, the Consulship of Rio Janerio, under Lincoln, Marshal of the Supreme Court, and finally, in 1873 he represented the Cleveland district in Congress. In whatever position or calling he found himself, his works proved the merit of the man and the value of his power. Mr. Parsons was a perfect gentleman in the highest sense and possessed those qualities that mark the courteous—qualities so pleasing and yet so rare. Few living men could cite an acquaintanceship with the great statesmen and leaders of the past forty years as broad and as influential as that of Mr. Parsons.

As an orator he was forceful and commanding. In speaking, as in other things, his life was moulded much by the influence of the great men with whom he came in contact. So his life presents to the younger generations a type of Americanism that flourished in the years following the rebellion.

The Journal, in the decease of of Mr. Parsons, mourns the loss of a personal friend. On many occasions his prolific mind and pen have added interest to its columns, and his continual regard for its welfare

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are matters which will ever live in the grateful remembrance of the editors of the Journal. R. B. N.

In Phillips vs. McConica, 51 N. E. 455, decided by the Supreme Court of Ohio, the plaintiff, executor, paid a legacy to an adopted child, erroneously believing her to be entitled to it by law. On discovery of the mistake the plaintiff sued for recovery of the money. It was held that the money could not be recovered, being paid under a mistake of law.

The weight of authority is undoubtedly with the above case, but all reason is against it. Culbreath vs Culbreath, 7 Ga. 64; Keener Quasi Contracts, 90. The reason for the rule as assigned generally and in the principal case is the maxim: "Ignorance of the law excuses no one," a rule which it is submitted should not be invoked against one who has done no wrong for which he seeks excuse. He has, however, under a mistake, given money to a person who, in equity and good conscience cannot retain it; a reason which operates to return it to the payor, if the mistake is one of fact. No valid ground can be assigned why the same result should not follow where the mistake is one of law. Keener Quasi Contract, 95.

The Supreme Court of Ohio seems to be fully committed to the doctrine as announced, having affirmed it in numerous decisions. City of Cincinnati vs Gaslight & Coke Co., 53 O. S. 278, and cases cited.

The executor might have saved his right to recover by obtaining the direction of the court as to the proper person to receive the money. (Upson vs Noble, 35 O. S. 655, Rev. St. Sec. 6202). If he had then paid the money to the wrong person he would have recovered. This is practically the decision in the recent case of Lawyers' Surety Co. vs Reinach, decided by the Supreme Court of New York. The court there held that the money being paid under sanction of a judicial decree, was not a *voluntary* payment and the decree being changed, the executor could recover.

In their attempts to get away from the harshness of the rule the courts have resorted to many refinements and distinctions, so that in many jurisdictions, though it is invariably stated as the rule, that there can be no recovery for money paid under mistake of law, very little of the rule remains.

In Delaney vs. Delaney, et al, decided in Supreme Court of Illinois Oct. 24, 1898, and recorded in Chicago Law Journal Dec. 23, 1898, the question of the right of the member of a beneficial order or mutual benefit society to change his beneficiary, has again been passed on. The court hold that it is well settled that such member had a right to change his designation, unless there is a provision in the statute of the charter or bylaws of the society, or in the certificate inself, *forbidding*

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such change. We think that the shoe should be on the other foot—namely, that unless a statute, charter, by-law, or provision in the certificate *permits* the change, the member has no such right, basing our contention on the theory that such a designation is an executed gift. The court, as usual, gives no reason to support its position, but simply say it is well-settled, as usual, citing Niblack on Benefit Societies, and the line of cases generally cited, none of which it is to be noted contain any reasoning worthy of the name. For further discussion of this subject see article on "the Right to Change Beneficiaries," by F. S. McGowan, Western Reserve Law Journal for January, 1898, Vol. 3, No. 8.

The supreme court before adjourning, appointed Judge Gilbert H. Stewart, of Columbus; Frank F. Oldham, of Cincinnati, and James W. Halfhill, of Lima, to be new members of the law examination committee, to succeed, A. D. Follett, of Marrietta; L. A. Koons, of Athens and J. F. Stockdale, of Cambridge, whose terms have expired.

The court also designated J. P. Caldwell, of Jefferson, for chairman of the committee. He with Hiram Van Camp, Jr., of Toledo, George C. Kohler, of Akron, Paul Howland, of Cleveland, Edmund B. Dillon, of Columbus, and Seymour Cunningham, of Chillicothe, are the hold-over members of the committee. The court also made a rule that applicants for admission to practice who send in a certificate that has to be returned for correction will have to accompany the returned certificate with fifty cents.

By order of the court, the clerk was instructed to send out the following circular:

"The clerk of the supreme court desires students at law to be informed that certificates of study given by schools known as "Correspondence Law Schools," or by lawyers without the state, certifying that the applicant has studied under their supervision within the state of Ohio, do not satisfy the Ohio statute and the rules respecting study ordered by the Supreme Court of Ohio. Such certificates will not be filed or in any way recognized."

Duty of Judge to Listen to Arguments.—On Oct. 20 the Iowa Supreme Court reversed a conviction in the case of State vs Carnegy partly on the ground that the trial judge stepped out of the court room during the attorney's argument, and could not decide an objection made. The majority of the court held that the trial judge must keep within hearing of the whole proceedings during the trial, and that failure to do so was a sufficient ground for a reversal. In view of the prevalence of the practice of trial judges leaving the court-room during trial, this decision possesses considerable importance. Given, J., dissented.

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Recent Cases.

AGENCY--ILLEGAL TRANSACTION.— Plaintiff, on the defendant's representation that the former was about to be prosecuted for procuring an abortion, paid the defendant a sum of money "to hush up the matter." Plaintiff, on finding that defendant's statement was false and that the latter had pocketed the money, sued to recover it. Held: Plaintiff can recover.

Smith v. Bachley, 41 Atl. (Pa.), 619.

There are numerous cases which decide that an agent obtaining money for his principal through an illegal transaction, cannot defend an action for the money on the ground of illegality. In the principal case the agent received the money from the principal to be devoted to an illegal purpose, and on failure to so apply it the principal sues to recover it. In such case also, it seems the agent cannot interpose the illegality as a defense. Kiewert v. Rindskopf, 46 Wis., 481; Mechem, Sec. 526.

BILLS AND NOTES—NOTICE OF INFIRMITY.— Plaintiff, the owner of a promisory note, by purchase from payee, sues maker. The defendant pleads want of consideration of which plaintiff had notice. Held: A charge to the jury "defense will be sustained if the evidence shows that circumstances were brought home to plaintiff, which should have put him on guard," is erroneous.

Lehman v. Press, 76 N. W. (Ia.), 818.

The decision is in line with the great weight of authority in this country, and with the rule in England. The leading case of Johnson v. Way, 27 O. S., 374, places Ohio on the side of the majority. These cases hold as a single test of the purchaser's right—bad faith, i. e. taker must be shown to have notice or the circumstances must show that he was wilfully negligent, thus acting in bad faith. There can be little doubt but that this is the better and more just rule. Limerick Bank v. Adams, 40 Atl. (Vt.), 166.

CARRIERS—RIGHT OF ADDRESSEE OF EXPRESS PACKAGE.-- A package was addressed to plaintiff "in care of the American Company." The latter refused to receive it, not knowing plaintiff. The plaintiff, addressee, demanded it, but Express Company refused to deliver. Plaintiff brings replevin. Held: Plaintiff can maintain his action.

U. S. Express Co. v. Hammer, 51 N. E. (Ind.), 953.

The precise point decided has perhaps never before been decided in this country. The opinion seems sound, however. The plaintiff was clearly the person to whom the package belonged, and although it is admitted that a delivery to the one in whose care it was sent, would have been proper, (Russel v. Livingston, 16 N. Y. 515) it is nevertheless true that the addressee is the real party in interest, and thus entitled to the possession of the goods.

CONTRACT--RATIFICATION BY INFANT.— Defendant had promised to pay rent for premises occupied while an infant. On suit he pleaded infancy and plaintiff replied alleging ratification. Defendant proved that he was ignorant of his right to repudiate his contracts of infancy. Held: The ratification was valid.

Bestor v. Hickey, 41 Atl. (Conn.), 555.

The case is probably in accordance with the weight of authority. 10 Am. & Eng. Ency. of Law, 1 Ed. 648. Anderson v. Soward, 40 O. S., 325. Contra. Baker v. Kennet, 54 Mo. 82; Hinely v. Margaritz, 3 Pa. St. 428. The court in the Ohio case do not base their decision on the questionable ground that ignorance of the law is no excuse, but say, "A ratification after majority is a waiver of a purely personal privilege, and the general rule that a new promise made with knowledge of the facts which make a defense waives the defense, is quite as applicable to a case of this kind as to any other."

CONSTITUTIONAL LAW—ANTI-SCALPERS ACT.-- Plaintiff was arrested for violating what is commonly known as the anti-scalpers Statute of New York; the Statute forbade the selling of the passage tickets of any railroad or vessel by any one except authorized agents. A writ of habeas corpus was applied for

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on the ground that the statute was unconstitutional. Held: The prisoner should be discharged, the statute being unconstitutional.

People v. Warden of City Prison, New York Law Journal, Nov. 28, 1898, Alb. L. J.—

In the November issue, page 160, we had occasion to note a decision similar to that in the principal case, decided by a circuit court of Illinois, and our comment on that case is largely appropriate here.

Admitting that "liberty" as used in the Fourteenth Amendment includes the right to exercise a trade, how can the court say that the defendant is being deprived of his liberty without due process of law? Clearly the passing of a statute by the properly constituted authority is a method of legally depriving a person of his liberty, provided that authority act within its scope. It seems a court cannot say that in this instance the legislature went beyond its powers. Under its police power it has the right to pass any law whose object it is to promote the health, morals or safety of the people, and if a statute, in any appreciable degree, promotes these objects a court is powerless to declare it unconstitutional. Powell v. Pennsylvania, 127 U. S. 678; Barbier v. Conolly, 113 U. S. 27.

Every one knows that fraud is practised, to a large extent, in the sale of scalped tickets, and it is difficult to perceive how a court can say that the statute in question did not tend substantially to check this evil and conduce to the public welfare. The decision was by a divided court, four to three, and cannot be reconciled with the cases decided by the Federal Supreme Court.

CONTRACTS—RESRAINT OF TRADE.—An agreement between two physicians to practice medicine read thus: "In consideration of the advantages and benefits to R—— by formation of said firm, he agrees that should said firm at any time hereafter be dissolved, he will not locate or engage in the practice of medicine at town of Oliver or at any place within fifteen miles radius from the drug store of L—— without the consent of L——." For violation of this agreement $1,000 was a sum annually, during violation, due L—— as damages. Held: Illegal as in restraint of trade, because its literal enforcement would in certain contingencies likely to arise, and which must necessarily have been in the contemplation of the parties, result in needlessly oppressing one of them, without affording any corresponding benefit or protection to the other.

Rakestraw v. Lanier, 30 S. R. (Ga.), 735.

This case furnishes a good discussion of contracts in restraint of trade and contains uncommon characteristics in as much as the restraint sought to be enforced was not connected with the sale of a business or property rights. The court while adhering to the general test of such provisions—that of reasonableness—undertakes to draw a line between agreements applying to a sale of a business or property, and those which restrict practicing a profession. It does not appear that this is a better test and the court itself does not find it any help, but ultimately resorts to the familiar test indicated, to wit: the reasonableness of the restriction, and rightly finds here that the restraint is unreasonable and larger than the protection of the promisee requires, as it might easily extend beyond the life of the promisee, in which event it could be of no possible benefit to him. It is not altogether certain that the contract under consideration is in restraint of trade at all. It substantially provided that if the defendant did engage in the practice of medicine he would pay the plaintiff $1,000.00 per year. If the plaintiff had any possible interest in the performance of the contract it would seem that the sum provided as liquidated damages was a fair compensation for the interference with plaintiff. In other words if the contract was for a division of the business of a locality, the defendant was not prohibited from practicing, but was to pay plaintiff a stipulated sum for interfering in plaintiff's territory, which we think would be reasonable and valid. H. C.

DEEDS—ESCROW—UNAUTHORIZED DELIVERY.—Plaintiff had given a deed to a depository in escrow. Before the performance of the conditions the grantee, by fraud, procured the deed from the depository and mortgaged to defendants. Held: Defendant got no title, though a purchaser without notice.

Dixon v. Bristol Savings Bank, 31 S. E. (Ga.), 96.

The weight of authority is probably with the principal case. The court says

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that the doctrine that where one of two innocent persons must suffer, he whose act has caused the loss must bear it, does not apply. The equities are equal; the legal title which remained in plaintiff must prevail. Ogden v. Ogden, 4 O. S, 182, follows the same rule, placing the decision on the ground that an essential element to the conveyance of title was lacking, viz: delivery with intention to deliver.

DOMESTIC RELATIONS — HUSBAND AND WIFE CONFIDENTIAL COMMUNICATIONS. —The accused offered a letter in evidence, written by one of the witnesses for the state, to the latter's wife. It does not appear how the accused obtained possession of it. Held: Inadmissible, being a privileged communication.

Mercer v. State, 24 South. (Fla.), 154.

There is a considerable array of authorities to the effect that when confidential communications between husband and wife, or between attorney and client, get out of the possession and control of the parties to the confidence, and find their way into the possession and control of third persons, regardless of the manner in which the possesion thereof may be obtained then such communications lose the protected privilege of the law and become competent evidence. 1 Greenleaf Ev. Sec. 254. The principal case expressly refuses to follow these authorities, and perhaps with good reason.

If the statement was made by reason of the confidential relation existing between the one making it and another, it becomes a privileged communication. The privilege belongs to the maker of the statement, and he alone can waive it.

In order to constitute a waiver, consent to a disclosure to a third person should at least be necessary, which was not the case in the principal case, it not appearing that defendant obtained possession of the letter through any fault of the writer. Scott v. Com., 94 Ky. 571.

EVIDENCE—CONFESSION.—The prisoner was told by a detective: "You needn't answer me any questions if you don't choose to, and whatever you may say may be used for you or against you." Confessions made subsequent to the above statement. Held: Admissible, not being obtained by promises or threats.

Roesel v. State, (N. J.) 41 Atl. 408.

EVIDENCE—PRIVILEDGED COMMUNICATION.—An action was brought for failure to promptly deliver a message. On the trial a veterinary surgeon, who had treated the plaintiff's horse, was asked on cross examination what the plaintiff said to him in regard to the animal. On objection to this question. Held: A communication between such a surgeon and another with regard to the illness of the latter's animal is not a privileged communication.

Hendershott v. W. U. Tel. Co., 828.

MARRIED WOMEN—LIABILITY FOR ACT OF HUSBAND AS AGENT.—Where a husband, acting within the scope of his authority as agent for his wife, inflicts personal injuries upon a third party, he renders his wife liable, since whatever is done within the scope of the agency is done by her authority.

Shane v. Lyons, 51 N. E. (Mass.), 976.

The case is a logical result of the Married Women's Acts, which give to married women the powers and rights of a feme sole. Thus if she appoints an agent she is liable for his acts within the scope of his authority. The fact that her husband is the agent does not change the matter, the court holding that there is nothing in the marital relation which takes the case out of the general rule.

STATUTE OF FRAUDS--DEED FROM CLIENT TO ATTORNEY.--Plaintiff transferred property to defendant, her attorney, by absolute deed, in order that the attorney might enforce certain claims for her. There was an oral agreement to reconvey, on which plaintiff brings this action. Defense, the statute of frauds. Held: The defense will not be allowed.

Hawkins v. Dunmore, 54 N. Y. Sup. 165.

The court applies one of the equitable doctrines modifying the effect of the statute. This is done, when to enforce it would work a fraud. See 8 Am. and Eng. Ency. of Law. 738.

STATUTE OF FRAUDS— PLEADING—Plaintiffs sue on an agreement to con-

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vey land under a denial of the contract. Held: Defendant can rely on the statute of frauds.

Hillman v. Allen, 47 S. W. (Mo.), 509.

This is the English rule, which is supported to some extent in this country. Birchell v. Master, 36 O. St. 331—no reason is assigned for the rule. The weight of authority, however, seems to be in favor of the rule that the statute must be pleaded affirmatively. Barnes v. Coal Co., 47 S. W. (Tenn.), 498. If the statute does not affect the nature of the contract, but, as it is usually said, merely renders it unenforcible, it would seem that the plaintiff on proof of the contract has put forth a prima facie case, and it devolves on the defendant to show affirmatively that it is unenforcible.

TORT—DUTY OF RAILROAD TO TRESPASSER.—Plaintiff was injured by defendant's train while walking along its tracks. Held: The defendant was under a duty to look out for trespassers on its track; failure to do so rendering them liable in damages.

Chesapeake & Ohio Ry. Co. v. Perkins, 47 S. W. (Ky.), 259.

The rules on this subject are numerous and irreconcilible. See 19 Am. & Eng. Ency. Law. 933, where the author says the weight of authority supports the rule, that the extent of the railroad's duty to trespassers is that it refrain from wilful or deliberate injury. If the courts should hold a railroad to a different duty to trespassers than any other owner, it would seem that the rule as laid down in Ohio in Cincinnati & Zanesville Ry. v. Smith, 22 O. S., 227 is the fairer one. White J. says: "If the servants of the company in charge of the train having due regard to their duties for the safety of the persons and property in their charge, could by the exercise of ordinary care have seen and saved them, we think they were bound to have done so."

The court in the principal case also decides that the simple acquiescence on the part of the railroad in the use of its track by the public, does not amount to a license so to use it. There are many cases holding that the company's acquiescence in a certain use of its track implies a license. Davis v. Chicago, 58 Wis. 646.

WILLS—DELEGATION OF POWER TO APPOINT EXECUTOR.— A will provided that a majority of testator's children should appoint the executor. The eldest child applied for appointment as administrator, objecting to the appointment of the choice of the majority. Held: That the testator's provision for executor is valid.

Wilson v. Curtis, 51 N. E. (Ind.) 913.

Although there are not many decisions on the subject the rule seems correct. A testator has the right to name whom he wishes as his executor, provided he be competent. Subject to this limitation it seems fair to permit the testator to rely on the judgment of another person in the appointment of the one who is to administer the estate. Shouler Excrs., Sec. 41.

Ohio Digest.

Assessment. Sewer assessment payable in one installment exceeding 1-10 value of property, is not void as to excess, which will be collectible in a future year. 8 O. D., 27

Auditor. Auditor elected to succeed appointee to a vacancy under §11, Rev. Stat., shall hold office for a term of three years commencing on 3rd Monday in October next after his election. 40 B., 398.

Bastardy. Defendant in bastardy marrying complainant is no bar to further prosecution by her. 9 O. C. D., 106.

Bill of Exceptions. Must contain all the evidence to warrant reversal of judgment; bill omitting any of the evidence will not avail, although stating that "all other testimony offered related solely to character and extent of plaintiff's injury." 9 O. C. D., 112.

Bridges. County commissioners have authority to construct bridges in cities, not entitled to any portion of bridge fund, only on such streets as form part of a state or county road. 16 C. C., 563. 40 B., 407.

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Common Carrier. If goods are marked and consigned to a point beyond carrier's line, liability continues throughout entire route in absence of express contract; conditions stamped on contract after execution must be assented to by shipper to become effective. 8 O. D., 22.

Constitutional Law. §3643, Rev. Stat., requiring arbitrators of loss under insurance policy to be residents of county where loss occurs, is constitutional. 7 O. D., 571.

Act (93 O. L., 93) requiring signers of papers to secure nomination of candidate to pledge themselves to support and vote for such candidate, interposes no impediment to exercise of the elective franchise and is valid. 40 B., 386.

Criminal Law. §6841, Rev. Stat., refers only to persons charged by law with performance of duties therein mentioned, and does not apply to a mere clerk or agent who is not a public officer. 5 O. N. P., 514.

An accused person under an invalid ordinance does not waive right of prosecuting error by pleading guilty. 5 O. N. P., 520.

Imprisonment for a felony which is terminated by an unconditional pardon is not to be regarded as a former imprisonment under the habitual criminal act. 41 B., 15.

Damages. Breach of warranty in sale of harvesting machine, plaintiff will not be allowed to show a loss of crop resulting therefrom, but may only recover expense of notifying warrantee and of repairing machine. 16 C. C., 612.

Dead Body. Statute imposing penalty for unlawful possession thereof, §3764, Rev. Stat., does not apply to remains long buried, nor is it directed against cemetery associations. 40 B., 400.

Ditches. In construction of, from upper to lower county, county commissioners of each county have exclusive jurisdiction and authority in construction of ditch in their own county. 16 C. C., 604.

Dower. Rights of relict husband, whose wife died in 1883, governed entirely by law as it was at time of her death. 16 C. C., 591.

Forfeiture of land to state for non-payment of taxes bars wife's or widow's right to dower therein; subsequent purchase of land by heirs does not reinvest widow with right of dower. 9 O. C. D., 163.

Executor. Acting as officer of court for benefit of creditors is not required to account to court for trust funds that when collected should be distributed to heirs and devisees and not paid as assets to creditors. 5 O. N. P., 518.

Exemption. A debtor who has concealed property to value of $500, will be deemed to have selected such property for exemption, and will not be allowed to claim as exempt any other property which has come into possession of court. 16 C. C., 570.

Evidence. Docket of J. P. before whom criminal prosecution was had for assault and battery, showing a plea of guilty, is admissible as evidence in civil case, subject to explanation. 16 C. C., 597.

Wealth of a defendant in action for damages for assault may be shown as touching his ability to respond in damages. 16 C. C., 597.

Hearsay evidence admissible to prove residence. 7 O. D., 571.

Parol evidence of an implied warranty is inadmissible when such warranty forms part of the description and is essential to the identity of the thing sold. 8 O. D., 30.

Fraud. Will be presumed from inadequacy of consideration only where disparity is so great as to shock the moral sense; this presumption may be rebutted. 8 O. D. 4.

Homestead. Land set aside to mother as homestead, son supporting her for rents and profits therefrom; son on death of mother is not liable to her creditors for rents and profits which he has received. 40 B., 388.

Insurance. Provision that suit be brought within 12 months after loss shall occur means after the fire and not after loss becomes payable by making of proofs. 7 O. D., 573.

When premises deemed occupied in accordance with provisions of policy considered. 9 O. C. D., 118.

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Insanity. Where insane person has made a contract and received a benefit under it, he will be liable thereon if the contract is fair and the other party has acted without fraud. 16 C. C., 587.

Mortgage. Where by contract between the parties, mortgagor under chattel mortgage remains in possession and sells, without agreement for accounting for proceeds of sale, the mortgage is fraudulent and void; retention of possession and sale by mortgagor raises presumption of such a contract, which presumption may be rebutted by showing good faith of parties. 50 N. P., 512.

Municipal Corporation. A village not entitled under statute to take charge of construction of bridges within its limits, is liable for an injury caused by an excavation in its streets made by county commissioners in constructing bridge. 16 C. C., 556.

Statute giving corporation power to contract for lighting for a term not exceeding ten years, impliedly forbids and nullifies a contract for any longer term. 40 B., 392.

Ordinance 214 of city of Cincinnati, licensing ticket-brokers, is unauthorized and void. 5 O. N. P., 520.

Negligence. Petition by servant against master for defective appliances must aver lack of knowledge by servant or that latter informed master and relied on promise to remedy. 9 O. C. D., 98.

Where brakeman making coupling attempts to remedy a defective coupling, which attempt is proximate cause of his injury, such facts may not defeat a recovery by him. 9 O. C. D., 112.

Duty of railroad to carry safely continues to protect a passenger carried beyond his destination; where injuries are result of a collision, burden of proof is on railroad. 9 O. C. D., 123.

Negotiable Paper, Alterations in note, when effective to avoid; an alteration making a non-negotiable note negotiable is not material when note is not in fact negotiated but is enforced between original parties. 16 C. C., 578.

Pleading and Practice. Where printed record is filed in connection with petition in error to supreme court, according to §6711, Rev. Stat., motion by defendant to dismiss because such record is incomplete will not lie. 40 B., 402.

Plaintiff may show a waiver of conditions under an averment in petition of performance. 9 O. C. D. 118.

A consignor of goods may sue carrier for their loss, although title had passed to consignee. 8 O. D., 22.

Transcript taken on petition in error to supreme court, failure to exhibit error complained of, cannot be amended after expiration of 6 months allowed for filing same; but if certificate of a clerk of court authenticating transcript is defective, such defect may be corrected after period allowed for filing. 41 B., 9.

Pledge. Pledge of stock as security for a note with conditional agreement for sale of stock to holder of note: where payee named in note furnishes no consideration but acting as attorney for maker is to secure such consideration from another, the payee is thereby vested with authority from maker to receive the original consideration, but on holder's electing to purchase the stock, by paying difference between price of stock and amount due on note, payee has no authority to accept such payment. 41 B., 11.

Probate Court. Where assignee has commenced action in probate court to sell real estate assigned, the court has power to grant relief to a defendant mortgagee who in cross petition demands foreclosure as to part of land covered by mortgage. 5 O. N. P., 522.

Real Property. Where owner of ancestral property conveys to another to delay creditors, with agreement for reconveyance and, the grantor dying, reconveyance is made to widow, the ancestral character of property is destroyed and brothers and sisters of original grantor have, as heirs, no rights in the property. 40 B., 361.

Where ancestral property is held in common and partition is made by mutual releases, each parcener holds his parcel as ancestral property to descend on his death according to §4158 R. S. 40 B., 365.

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Railroad. Term "railroad" as used in §§3208, 3231, Rev. Stat., does not include street railroads. 41 B., 5.

Trust. Trust estate in personal property may be created by parole; one becoming sole legatee on promise to pay others, will on refusing to pay, be declared trustee for their benefit. 7 O. D., 564.

Venue. Right to change of, under §5033, Rev. Stat., is acquired by filing five affidavits which allege that affiant "believes" a fair trial impossible. 8 O. D. 9.

Warranty. In sale of known, described and definite article from a manufacturer for a known purpose, warranty will not be implied unless it appear that buyer had a right to rely and did rely on seller's judgment. 8 O. D., 30.

Widow. Right to year's allowance for support will not be considered waived or relinquished by mere lapse of time. 5 O. N. P., 516.

Supreme Court Bar Examinations.

PLEADINGS.

46. (a) If it appear on the face of the petition that plaintiff has not legal capacity to sue, how would you object?

(*b*) If there are several causes of action in the petition and they are not separately stated and numbered, and you appearing for the defendant, desire that done, what would you do?

47. What is a material allegation in a pleading?

48. How is a civil action commenced?

49. What is a plea by way of confession and avoidance?

50. A sues B for $500.00 damages for assault and battery. B is the owner of a judgment on a promissory note against A. May the judgment be pleaded as a set-off or counter-claim, and if either, which?

51. Give four of the most common of the personal actions at common law.

TORTS.

52. Give the several elements necessary to constitute a deceit.

53. A and B fight, by agreement, each receiving injuries in the conflict. Has, or not, each a right of action against the other? Give reasons.

54. A is bitten by B's dog and brings an action for damages. What must A aver and prove to entitle him to recover under the common law?

55. S sues a railroad company for damages for an injury received while driving across the defendant's track at a highway crossing. It is satisfactorily proven that the defendant was negligent. What acts of care and deligence must the plaintiff prove he did to exonerate himself from contributory negligence?

56. H sues S for slander. He avers in his petition that during a certain period he had been a soldier in the service of the United States, and had been honorably discharged: that on a certain date the defendant, in a discourse which he then had with and concerning the plaintiff, in the hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, and defamatory words following: "You (meaning the plaintiff) are a deserter": meaning that the plaintiff had deserted from the army of the United

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States. The petition alleges no special damages. Demurer to the petion. Write an opinion, of not more than ten lines, ruling on the demurrer.

57. Name five cases in which a person's utterances are absolutely privileged under the law of slander and libel.

REAL PROPERTY.

58. (a) What interest had the husband, at common law, in the real and personal property of his wife, before and after her death?

(*b*) What right had the wife in her husband's real and personal property before and after his death?

(*c*) What changes, if any, have been made in any of the above respects in Ohio?

59. A built his house so close to B's land that the eaves projected three feet over B's land. After twenty-one years A commences to build a bay window three feet wide at the side of his house on the ground overhung by the eaves. What are B's rights, if any?

60. X, a widow, had an only son, Y, and three parcels of land—A, B and C. By deed of gift she conveyed A to Y, and afterwards died, devising B to Y, but making no disposition of C. Y afterwards bought another parcel, D, and died intestate. His nearest relations were his uncles, O, his father's brother, and P, his mother's brother. Who inherited the various parcels belonging to Y, (*a*) at common law, (*b*) in Ohio?

61. A buys a ticket to a theater. The owner of the theater, without cause and without using unreasonable violence, prevents A from entering the theater. Is the owner liable for assault?

62. The Council of the City of Columbus, by ordinance, granted the right to separate private companies to construct, operate and maintain (1) a street railway, (2) a telephone line, (3) a gas main, (4) a telegraph line, (5) an electric light line, (6) a line of steam railroads, each with the necessary appliances along High street. What remedy, if any, has an owner of property owning to the center of the street, who objects to the several companies occupying the highway?

63. A and B, owners of adjoining lots, agreed that A might build a wall, half on the land of each, and that it should be a party wall, and that whenever B, his heirs or assigns, used the wall, he or they should pay A, his heirs and assigns, one-half the cost of the wall. A put up the wall and sold his lot to M. B then used the wall for the first time.

(1) Who was entitled to the money from B?

(2) Suppose B desires to raise the wall another story higher than the original wall, can he do so?

LEGAL ETHICS.

64. While acting as attorney for a client certain scandalous facts are communicated to you by him as to his past life, which if known would degrade and greatly injure him. Subsequently you are asked by a banker concerning your client's character, etc.; what is your duty?

65. (*a*) Define maintenance.

(*b*) Define champerty.

66. During the trial of a case in which you are engaged, a slip of paper accidentally falls from opposing counsel's table without his knowl-

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edge and falls at your feet. On picking it up you perceive it contains a lot of information relating to the case which you had vainly endeavored to discover previously without success, and that by glancing over the same it would enable you to win your case; your client also is aware of the same facts. Would you be justified in reading it and taking advantage thereof before handing it back?

PERSONAL PROPERTY.

67. At common law, on the death of the owner, to whom do the following articles go: (1) Heirlooms, (2) emblements, (3) fixtures, (4) cut timber, (5) nursery trees, (6) manure, (7) title deeds, (8) church pew, (9) unripe fruit on the trees, (10) fence rails?

68. A authorizes B to sell his horse, but instructs him not to sell for less than $100. B sells the horse to C for $75. C did not know the exact terms of B's authority, but knew B had a right to sell. What remedy has A?

69. B converted a mare, the property of A, in 1890. In 1893 the mare had a foal, which, as a yearling, B sold to C. A then discovers the whereabouts of his property, and brings an action to recover the value of the colt from C. Can he recover?

70. B converted a horse belonging to A. A brought an action in trover against B and recovered judgment for the full value of the horse and took out execution thereon. Can levy of the execution be made on the horse?

71. A sent a carriage to B for repairs. When repaired, A came for it, but B refused to give it up unless he was paid for the repairs. He told A unless he immediately paid for the repairs and took away the carriage hewould charge him storage. Some months later A tendered B the amount due for the repairs and demanded the carriage. B refused to give it up unless he was paid for the storage. Can A recover the carriage without paying the storage charges? Why?

DOMESTIC RELATIONS.

72. A was a servant of B. A sent his son, an infant, to perform some labor for him in the line of his employment by which C was injured. Is B liable? Would there have been any difference if C had been the fellow servant of A? Why?

73. In 1889, A was appointed guardian for his twelve-year-old niece. Will the payment to A in 1894 of the niece's distributive share of an estate discharge the ward's claim? Why?

74. What is the general rule as to whether a husband and wife can, by any contract with each other, alter their legal relations? Give exceptions.

75. Give the ten causes for which a divorce may be secured in

76. (*a*) A brings suit against B and wife on account of groceries furnished them at B's request. Is B's wife liable? What is the general rule in such cases?

(*b*) Has a man a right to the services of his step-children?

(*c*) Is he bound to support them?

WILLS.

77. The item disposing of testator's real estate is as follows: "I

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give and devise all my real estate to my friend A for life; after his death to his heirs in fee." What estate does A take?

78. (*a*) A testator has no child at the time of making his will, but subsequently a child is born to him. What is the effect of the birth of the child on the will?

(*b*) An unmarried woman makes a will and subsequently marries. Does the marriage revoke the will?

79. What is the effect of a witness to a will being a devisee?

80. A makes a will disposing of all his property. In the will he provides for his widow. What would you advise the widow as to her rights?

81. Is the following a valid will? If any defects, point them out:

"I give and devise all my estate, real and personal, to my wife, to be to her and her heirs forever. A. B.

"Subscribed by us in the presence of A. B.

C. D.,
E. F."

PARTNERSHIP.

82. William Jones retired from the firm of Smith & Jones, and Thomas Jones took his place, the firm name remaining Smith & Jones; are persons dealing with the new firm, who had not dealt with the old, bound to inquire of whom it is composed, from the new firm itself, or can they charge the retired partner because third persons report him to be still a member of the firm?

83. A and B were partners in the jewelry business. In the night season B entered the store, which was closed, by breaking through a back window, blew open the safe and carried away money and goods of the firm to the amount and value of $5,000.00. Was he guilty of burglary and larceny, and why?

84. Has one partner power to assign the firm's assets for benefit of creditors against a co-partner's will, or without his assent?

85. Will money borrowed by one partner on his individual credit become a debt of the firm by benig used in its business?

86. If the good will of a firm is not taken into account by partnership appraisers in their appraisement, and the partnership property is taken by the surviving partner at the appraised value, and the good will of the firm is approriated by him, can he be compelled to account for its value to the deceased partner's estate?

CONSTITUTIONAL LAW.

87. (*a*) A rule of the Common Law, a statute of the State and the State Constitution irreconcilably conflict; which prevails?

(*b*) If certain legislation is not directly, or by implication, authorized either by the Constitution of the United States, or of this State, but is prohibited by neither, would it be valid if enacted by Congress? Would it be valid if enacted by the State Legislature?

88. What is an *ex post facto* law? To what branch of jurisprudence does the prohibition of such laws relate?

89. Mention at least four powers, usually incident to sovereignty, which are forbidden to the several States by the United States Constitution.

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BAILMENTS.

90. A lends his horse and carriage to B, to be used by B for a limited time, without any payment for its use. During this limited time C wrongfully injures the horse and carriage. Can B recover any damages from C?

91. B rents a horse and carriage from A for a week, at an agreed rental. B keeps the horse and carriage ten days, and on the tenth day, by an unavoidable accident, the horse and carriage are injured. Is B liable to A for injuries so caused? Why?

92. A shipper, in order to obtain a lower rate of freight than he would otherwise have to pay, agrees with a railroad company that if his property is destroyed in transit he will make no claim therefor against the company. By the negligence of servants of the company the property is destroyed in transit. Can the shipper recover damages against the company? Why? In the case stated suppose the shipper's agreement was that his claim for damages should not exceed a certain sum. Would the shipper be bound by that agreement? Why?

93. What is the difference between the common law liability of a common carrier of goods and of a warehouse man? May a common carrier of goods ever change its liability to that of a warehouse man; and if so, under what circumstances and how?

94. A warehouse man, by mistake, signs and issues a warehouse receipt for property not delivered to him. The holder of the receipt sells the property mentioned in the receipt to an innocent purchaser for value, and assigns and delivers the warehouse receipt to the purchaser. Can the purchaser hold the warehouse man liable? Why?

95. A traveler stops at an inn, taking his baggage into his room with him. During the night a servant of the innkeeper whose conduct and reputation up to that time was good, steals this baggage. Is the innkeeper liable? Why?

SURETYSHIP.

96. When does the right of contribution, as applied to co-sureties, arise, and upon what is it based?

97. A, the principal on a note, presented it to B, who signed it as surety, but without so designating it on the note. A was then entrusted with the note and presented it to C, who signed it, stipulating orally, at the time he did so, that he signed it as surety for both A and B, but without so designating on the note. B paid the note. What are his rights, if any, against C? Give reason for answer.

98. A and B were sureties on a note upon which C was principal. C gave A a mortgage to secure him against loss by reason of his suretyship. The sureties were compelled to pay the note. What are B's rights, if any, in the benefits arising from the mortgage?

99. What is the difference between guaranty and ordinary suretyship, as applicable to negotiable instruments?

100. Name three ways in which a surety may be released.

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The Right to Privacy.

It has long been public opinion that there must be found some principle of law to protect the privacy of the individual from the paragraphs, caricatures, and advertisements of the public print. A development in the law to meet this opinion would seem to be arrested by a recent decision in the Queen's Bench Division. *Dockrell* v. *Dougall*, 78 Law Times Rep. 840. In this case the plaintiff was a physician, the defendant the owner of a medicine called Sallyco. In an advertisement of his medicine the defendant published of the plaintiff, with substantial truth, but without authorization: "Dr. Morgan Dockrell, physician to St. John's Hospital, London, is prescribing Sallyco as an habitual drink. Dr. Dockrell says nothing has done his gout so much good." For this the plaintiff brought an action; but the suit was dismissed upon the ground that there was no injury to the plaintiff's property or reputation.

The present actions for defamation fail to give a remedy in two classes of cases where there may often be actual wrongs. When a statement is false but is neither libel *per se* nor a cause of pecuniary loss, and when a publication is true, there are no actions for defamation. The existence of this unredressed residue in the law governing publication has given rise to the question whether the modern law does not recognize something in the nature of a right to privacy to protect personal appearance, sayings, acts, and personal relations from unwished publicity. This hypothesis of a right to privacy has appeared by way of *dictum* in late American reports. *Schuyler* v. *Curtis*, 174 N. Y. 434. The tendency of English authority has also been definitely in the same direction until the refusal of a remedy in the principal case. *Prince Albert* v. *Strange*, 2 De G. & Sm. 652. The general result has been that with various reasons and in varying ways relief has been given in the case of some outrages against privacy; but the existence of a special category of rights to privacy has not been clearly realized, or the limits precisely defined. *Dixon* v. *Holden*, L. R. 7 Eq. 488.

The principle upon which a right against an invasion of privacy depends appears from a simple analysis of rights. Even crudest common law protected the person from more than mere batteries: it considered assaults and insults trespasses as well. The essential element in the trespass was the invasion of the person against the person's will. As sensations grew more intense, that became an invasion of the person which a ruder age did not so consider. The redress for the invasion of privacy may then well be a modern phase of the protection given to the person since the ancient trespass. If this view be correct, any publication which invades the privacy of a private individual, or such privacy of a public individual as he had not forfeited by his position, is a *prima facie* injury without more damage.—*Harvard Law Review.*

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